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Michael E. Solimine

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Forum-Selection Clauses and the Privatization of Procedure

Introduction

Like millions of Americans every year,¹ Eulala Shute took an excursion on a cruise ship. The *Tropicale*, operated by Carnival Cruise Lines, Inc. ("Carnival"),² took Mrs. Shute and her husband from Puerto Vallarta, Mexico, to Los Angeles. While off Mexico, she was injured during a tour of the galley. Eventually she brought suit against Carnival in federal court in the state of Washington, her place of residence, to recover damages for personal injuries. The ticket provided by Carnival, however, had a forum-selection clause directing that all litigation must be pursued in a court in the state of Florida, Carnival's principal place of business. Last Term, the Supreme Court in *Carnival Cruise Lines, Inc. v. Shute*³ upheld the validity of the clause, requiring Mrs. Shute to litigate her claim, if at all, in Florida.

Forum-selection clauses⁴ have become increasingly common in civil litigation. These clauses have many virtues. They permit parties to

* Professor of Law, University of Cincinnati College of Law. B.A., Wright State University (1978); J.D., Northwestern University (1981). I thank Carolyn Kraft and Susan Sauter for their research assistance and the University of Cincinnati College of Law for financial support. I also thank Barry Friedman, Lea Brilmayer, Dan Hoffheimer, Earl Maltz, Harold Maier, Richard Myers, Richard Posner, Bill Richman and Joseph Tomain for their helpful comments on an earlier draft. None of the above-mentioned necessarily agree with the views expressed here.

1. Joseph B. Treaster, *Cruise Lines Ride a High Tide*, N.Y. TIMES, Sept. 28, 1987, at D1 (three million people took a cruise in 1987; as of 1987, about five percent of the American population had taken a cruise).

2. Carnival Cruise Lines advertises itself as the world's largest cruise line, based on the number of passengers carried. Daniel F. Cuff, *Carnival Cruises Chief Adds Chairman's Title*, N.Y. TIMES, Oct. 8, 1990, at D2. Cf. Laurie M. Grossman, *Carnival Cruise Discusses Investing in Seabourn Line*, WALL ST. J., Sept. 18, 1991, at A16 (quoting analyst who stated that Carnival "is definitely the McDonald's of the cruise industry").

3. 111 S. Ct. 1522 (1991).

4. Forum-selection clauses are also referred to as choice-of-forum clauses, forum clauses, jurisdiction agreements, etc. Any differences in these terms are unimportant for the purposes of this Article; the phrases will be used interchangeably. See M. Richard Cutler, *Comparative Conflicts of Law: Effectiveness of Contractual Choice of Forum*, 20 TEX. INT'L L.J. 97, 98 n.3 (1985) (cataloguing various terms and making same point).

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select a desirable, perhaps neutral, forum in which to litigate disputes. Such planning permits orderliness and predictability in contractual relationships, obviating a potentially costly struggle at the outset of litigation over jurisdiction and venue. Preselecting a forum also reduces the possibility of parallel lawsuits between parties in different fora.⁵ As illustrated by the *Carnival* case, courts over the past two decades have increasingly rejected challenges to the enforcement of forum-selection clauses. Indeed, one is hard-pressed to find a recent case which refuses to enforce such clauses.⁶ For these reasons, then, it is not surprising that lawyers are now routinely encouraged to place such clauses in contracts they prepare,⁷ a trend that is bound to increase given the recent tendency of business disputes to wind up in court.⁸

The rise of forum-selection clauses is a manifestation of the increasing deference to party autonomy in jurisdictional and related matters. Not coincidentally, the last two decades have also seen the enforcement of contractual choice-of-law clauses, and the upholding of waivers of personal jurisdiction and service-of-process requirements. These developments, however, have not passed without criticism. Doctrinally, a number of questions regarding forum-selection clauses remain in the wake of *Carnival*.⁹ These issues include the appropriate source of law to govern the validity and interpretation of such clauses, and the content of the consent to be demanded of a party agreeing to a preselected forum. Normatively, some writers remain unconvinced of purported benefits of such clauses. On that score, for example, it can be argued that the consent reflected in forum-selection clauses is unlikely to be genuine, and may often be the product—for those in positions like Ms. Shute's—of unequal bargaining power. Likewise, the forum chosen may be extremely inhospitable to one party, so much so that litigation may not be pursued at all.

This Article addresses the prospects and problems for forum-selection clauses. Part I of the Article summarizes the state of the law regarding such clauses. Initially, Part I considers the Supreme Court decisions, culminating in *Carnival*, which have given the impetus to the rise of such

5. See generally GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 172 (1989); James T. Gilbert, *Choice-of-Forum Clauses in International and Interstate Contracts*, 65 KY. L.J. 1, 2-3 (1976); Leandra Lederman, Note, *Viva Zapata!: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422, 422-23 (1991).

6. See *infra* Parts I.B. & III.C. for discussions of those few cases in which courts have refused to enforce such clauses.

7. See, e.g., ROBERT A. SEDLER, ACROSS STATE LINES: APPLYING THE CONFLICT OF LAWS TO YOUR PRACTICE 70-71 (1989); Edward W. Stern, *Lawyers Can Reduce Possibility of Defending in Out-of-State Court*, NAT'L L.J., Nov. 28, 1988, at 20.

8. Terence Dungworth, Marc Galanter & Joel Rogers, *Corporations in Court: Recent Trends in American Business Litigation* (paper delivered at annual meeting of Law & Society Assoc., Berkeley/Oakland, Cal., May 31-June 3, 1990) (unpublished manuscript on file with author); Marc Galanter, *The Life and Times of the Big Six; Or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 942-46.

9. Please excuse this and all other nautical puns.

clauses after a long period of judicial disapproval. Part I next considers the discordant strains in the score, namely, those few states that still refuse to enforce the clauses, and the academic criticisms of delegating such power to private parties.

Part II of the Article evaluates and attempts to clarify the doctrinal confusion over three broad topics relevant to forum-selection clauses. First, it considers whether individuals can contractually waive the due-process right to the protections of personal jurisdictional barriers and whether such waivers should be respected by courts. Second, Part II concludes that in diversity and most federal question cases, state law should govern the validity and interpretation of choice-of-forum clauses. The third portion of Part II argues that the best paradigm for interpreting choice-of-forum clauses coincides with present doctrine and embraces a contractual model that treats forum-selection clauses as it would any other contractual provisions. Finally, Part II considers factors related to consent (such as the relevance of the presence of a choice-of-law clause), and reconsiders several cases, including *Carnival*.

Part III considers three possible obstacles, drawn from positive and common law, to the increasing use of forum-selection clauses. Part III first addresses federal and state statutory provisions that may preempt, in whole or in part, the enforcement of such clauses. Part III next considers the relationship between forum-selection clauses and statutes or doctrines that permit the transfer of cases, for reasons of convenience, to other jurisdictions. Lastly, Part III addresses the international implications that occur when clauses direct that litigation must take place in a foreign country.

The final Part of the Article addresses some broader implications of the trend toward respecting party autonomy in procedural matters. Part IV focuses on one aspect of the debate concerning the pros and cons of Alternative Dispute Resolution (ADR), under the rubric of metaprocedure, which is apt to be highly critical of enforcement of forum-selection clauses, particularly those outside the commercial context. Part IV posits that most forum-selection clauses should be enforced, and indeed stand up well to the criticisms directed toward ADR and other reflections of party autonomy.

I. An Overview of Forum-Selection Clauses

A. Sailing from *The Bremen* to *Carnival*

The story of forum-selection clauses has been discussed in detail elsewhere;¹⁰ only the broad outlines need be sketched here. In general, the clauses operate in two ways. When litigation is commenced in a jurisdiction designated by the clause, there is personal jurisdiction by consent, or *prorogation*. But if one party brings suit in a court, which otherwise has

10. See, e.g., EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 278-84, 351-63 (1982); Gilbert, *supra* note 5, at 7-28; Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 138-49.

jurisdiction over the parties, but is not the court designated by the clause, then there is said to be *derogation*. At that point, the court must decide whether to proceed with litigation, or respect the clause by dismissing the action or transferring the case to the chosen forum.¹¹

It was the derogation question that fueled much of the long-time judicial hostility toward choice-of-forum clauses. Critics argued that the parties lacked power contractually to "oust" a court of otherwise proper jurisdiction, that enforcing such clauses would cause inconvenience and inconsistency, and that the clauses were against public policy.¹² These rationales could not bear the weight placed on them. The "ouster" concept, for example, misconceives the real issue, which is whether a court should abstain from exercising jurisdiction in a case in favor of a forum-selection clause. Thus, the problem is not one of improperly delegating judicial power to private parties.¹³ Similarly, permitting parties to contract over jurisdiction would appear to increase, not decrease, consistency and convenience for both judges and litigants, while the proverbial "public policy" escape hatch was nothing more than a bald conclusion.¹⁴

Despite the conceptual weakness of the traditional rationales, judicial hostility toward choice-of-forum clauses continued well into the 1960s. Even then, however, a trend toward enforcing such clauses was an emerging, if still minority, view.¹⁵ The trend was reflected in the late 1960s by the American Law Institute's revision of the Restatement of Conflict of Laws calling for choice-of-forum clauses to be enforced unless they were "unfair or unreasonable."¹⁶ Under this emerging

11. SCOLES & HAY, *supra* note 10, at 352.

12. Gilbert, *supra* note 5, at 8. While these were the ostensible reasons advanced in the case law, some writers have suggested that other reasons accounted for the hostility. For example, courts also evinced hostility toward other aspects of party autonomy—such as arbitration or choice-of-law clauses—and were concerned that choice-of-forum clauses often appeared in contracts of adhesion. *Id.* at 9. More crassly, the hostility is also thought to stem from a time when judges were paid based on the number of cases they heard. *Id.*

"Contracts of adhesion" is the rubric for form- or take-it-or-leave-it-contracts, "under which the only alternative to complete adherence is outright rejection." 1 E. ALLAN FARNSWORTH, CONTRACTS 480 (1990) (footnote omitted).

13. *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 375-76 (7th Cir. 1990) (Posner, J.) (describing and criticizing ouster theory).

14. Willis L. M. Reese, *The Contractual Forum: Situation in the United States*, 13 AM. J. COMP. L. 187, 188-89 (1964).

15. For a discussion of the case law and academic commentary prior to 1972, see Gilbert, *supra* note 5, at 11-19; Gruson, *supra* note 10, at 138-47.

16. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971). The first Restatement had rejected any deference to forum-selection clauses. RESTATEMENT OF CONFLICT OF LAWS § 332 (1934).

The original version of § 80 stated: "The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971). An amendment in 1986 to § 80 excised any reference to the ouster theory (thus deleting the words "cannot . . . agreement"), since it was "unnecessary to state the obvious fact in the black-letter rule that the parties cannot by their

view, fairness and reasonableness were to be gauged primarily by whether contractual particulars were met, and whether the chosen forum would seriously impair one party's ability to pursue a cause of action.¹⁷

Thus, it seems likely that the older view would have been eventually eclipsed. But the shift was powerfully accentuated in the last two decades by a cluster of Supreme Court decisions that bestowed approval upon forum-selection clauses.¹⁸ The first case was *National Equipment Rental, Ltd. v. Szukhent*,¹⁹ which upheld the appointment of an agent for service of process in conformity with Federal Rule of Civil Procedure 4. In the course of that decision, the Court opined that "it is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether."²⁰

Szukhent was a rather unexceptional diversity action involving the alleged breach of a lease of equipment by defendants in Michigan from a plaintiff in New York. It seemed to set the stage, however, for the Court's dramatic decision eight years later, in 1972, in *The Bremen v. Zapata Off-Shore Co.*²¹ *The Bremen* involved a contract between German and American corporations to tow a drilling rig from Louisiana to Italy. The contract contained clauses providing that all disputes under the contract would be brought before the Court of Justice in London, England, and disclaiming any liability by the German towing company for damages to the towed rig.²² After the tow was underway, the rig was damaged in a storm and taken to Tampa, Florida. There, Zapata, the American company, sued in federal district court in admiralty for negligence and breach of contract, despite the choice-of-forum clause.

In sweeping language, the Court enforced the clause in *The Bremen*.

agreement oust a state of judicial jurisdiction." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 reporter's note (1988 Supp.).

17. See, e.g., *Central Contracting Co. v. C.E. Youngdahl & Co.*, 209 A.2d 810 (Pa. 1965); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 cmt. a & reporter's note (1971). See generally Gilbert, *supra* note 5, at 11-19. Perhaps the burgeoning of court dockets of the last two decades was a further reason for courts to look favorably upon a safety valve which might alleviate the pressure (although adding to it in another forum).

18. One Supreme Court decision, *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), appeared to take a less positive view toward such clauses, and it is addressed *infra*, Part I.B.

19. 375 U.S. 311 (1964).

20. *Id.* at 315-16. *Szukhent* did not involve a forum-selection clause. The contract in question simply designated an employee of the plaintiff company "as agent for the purpose of accepting service of any process within the State of New York." *Id.* at 313 (footnote omitted). Strictly speaking, the clause did not waive personal jurisdiction barriers, much less designate New York as a, or the, forum to resolve disputes under the contract. But given that service of process was in effect waived, and service was effectuated in New York, the clause "must have meant to confer jurisdiction on New York courts." LEA BRILMAYER & JAMES A. MARTIN, CONFLICT OF LAWS 498 (3d ed. 1990).

21. 407 U.S. 1 (1972).

22. *Id.* at 2-3.

Recognizing the split in the case law of the time,²³ the Court held that "such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."²⁴ For support, the Court relied on *Szukhent* and the Second Restatement, among other things.²⁵ The Court emphasized freedom of contract and the utility of promoting certainty and predictability in international trade.²⁶ Several considerations informed the Court's reasonableness inquiry. The Court noted that the contract was "unaffected by fraud, undue influence, or overweening bargaining power,"²⁷ and that it was not seriously inconvenient for the parties to litigate in London.²⁸ Likewise, the Court brushed aside the argument that the exculpatory clauses, which apparently conflicted with American admiralty law,²⁹ would be enforced in the English court. Here, the Court said, American public policy was obviated by the international aspects of the agreement.³⁰

However *The Bremen* test might be characterized,³¹ it clearly displayed a generally benign attitude toward forum-selection clauses. Although the case is restricted to admiralty with international overtones, *The Bremen* has had a pervasive precedential effect upon state courts.³²

23. *Id.* at 10-11.

24. *Id.* at 10 (footnote omitted). The Court later added that the burden of proof lay with the party seeking to invalidate such a clause. *Id.* at 15.

25. *Id.* at 11-12. Professor Mullenix has argued that *The Bremen's* analysis "consists of little more than conclusory pronouncements and dicta elevated into received dogma." Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 *FORDHAM L. REV.* 291, 306 (1988). She argues, for example, that reliance on *Szukhent* is unpersuasive, since the operative language drawn from that opinion was dicta, and hardly reflected the prevailing view at the time. *Id.* at 307-11. Mullenix's analysis is persuasive but somewhat beside the point. Whatever the shortcomings of the *Szukhent* opinion, *The Bremen* did not rely solely on it and *The Bremen* fairly described the split in authority at the time. Moreover, admiralty jurisdiction has long been held to be a repository of federal common law power. See, e.g., *Miles v. Apex Marine Corp.*, 111 S. Ct. 317 (1990). Thus, *The Bremen* result was justified as an exercise of that power.

26. *The Bremen*, 407 U.S. at 9-12, 15.

27. *Id.* at 12 (footnote omitted).

28. *Id.* at 16-18.

29. *Id.* at 15 n.17.

30. *Id.* at 15-16.

31. See, e.g., Gilbert, *supra* note 5, at 32 (describing *The Bremen* as a "reasonableness" test); Gruson, *supra* note 10, at 163 (arguing *The Bremen* establishes a two-part test: reasonableness and fraud); Mullenix, *supra* note 25, at 356-60 (noting general uncertainty as to the precise parameters of *The Bremen* test).

32. Commentaries at the time, e.g., Harold G. Maier, *The Three Faces of Zapata: Maritime Law, Federal Common Law, Federal Courts Law*, 6 *VAND. J. TRANSNAT'L L.* 387 (1973) and today, e.g., Mullenix, *supra* note 25, at 299, 313, note that it was unclear whether *The Bremen* was announcing a federal common law rule binding on all courts in all cases, or one with merely persuasive force outside the admiralty context. While some courts still profess uncertainty as to this matter, see BORN & WESTIN, *supra* note 5, at 186-88 (giving examples), most courts seem to follow the latter view. For a recent example, see *Paul Business Systems, Inc. v. Canon U.S.A., Inc.*, 397 S.E.2d 804, 807 (Va. 1990) (adopting *The Bremen* analysis). For a collection of the numerous cases which have adopted *The Bremen* analysis for any forum-selection clause—domes-

In succeeding cases, the Supreme Court supported party autonomy by enforcing arbitration clauses³³ and settlements³⁴ and, in dicta, continued to speak favorably of forum-selection clauses.³⁵

Such was the context of the *Carnival* decision. The Shutes had purchased tickets, through a travel agent in their home state of Washington, for an excursion on a cruise ship operated by Carnival Cruise Lines. The tickets were mailed to them, after purchase, from Carnival's headquarters in Miami, Florida.³⁶ The face of the ticket admonished the reader to read the conditions on the last page,³⁷ and a paragraph on the last page explicitly stated that all disputes arising out of the contract would be exclusively litigated in a court located in Florida.³⁸

tic or international—and of those few cases which have not, see Francis M. Dougherty, Annotation, *Validity of Contractual Provisions Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R. 4th 404 (1984 & 1991 Supp.).

Indeed, given the importance in *The Bremen* of facilitating international trade, see *supra* note 26 and accompanying text, one might argue that *The Bremen* does not establish an across-the-board federal common law rule. Rather, it can be viewed as restricted to cases in the international context. See Maier, *supra*; Lederman, *supra* note 5, at 430. To provide certainty in international business dealings would arguably call for a federal, uniform rule—a result not necessarily compelled when persons within the United States deal with each other. And the choice of forum may be especially important (as contrasted with the substantive law to be applied) in such cases. Cf. note 132 *infra*. Hence, this argument would conclude, a federal common law rule is not appropriate for domestic diversity or federal question cases, but would be called for in such cases involving international elements. See *infra* Part II.B (discussing federal common law rule for choice-of-forum clauses). See also Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1472-73 (1991) (book review discussing how cases with international elements affect wholly domestic cases).

33. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991) (enforcing arbitration agreement over protest that it violates Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 626-634 (West Supp. 1991)); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (arbitration enforced over protest that it violates federal securities law and civil RICO); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (arbitration enforced over protest that it violates federal antitrust laws).

34. E.g., *Town of Newton v. Rumery*, 480 U.S. 386 (1987) (upholding release-dismissal agreement over argument that it violates policies of civil rights statute, 42 U.S.C. § 1983 (1988)).

35. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) (enforcement of "freely negotiated" forum-selection clause that is not "unreasonable and unjust" does not offend due process, citing *The Bremen*, 407 U.S. 1, 15 (1972)); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (parties may agree in advance to the jurisdiction of a given court, citing *Szuchent*, 375 U.S. 311, 316 (1964)); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) ("An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause . . ." and is upheld, relying on *The Bremen*, against an argument that enforcement of an arbitration provision between an American company and a German citizen would impair the federal securities laws.).

36. 111 S. Ct. 1522, 1524 (1991).

37. The first page stated:

SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES IMPORTANT! PLEASE READ CONTRACT — ON LAST PAGES 1, 2, 3.

Id.

38. The clause was in paragraph eight on the first of three pages of "terms and conditions," which contained a total of 25 numbered conditions. The clause stated:

Despite the clause, the Shutes sued Carnival in federal court in Washington. Carnival raised two defenses: there was no personal jurisdiction over the company in Washington and, in any event, the forum-selection clause required that suit be brought in Florida. The district court agreed with the second ground and did not reach the first.³⁹ On appeal, the Ninth Circuit reversed, holding that Carnival's contacts with Washington were sufficient to establish personal jurisdiction in that state.⁴⁰

With regard to Carnival's alternative defense, the Ninth Circuit declined to enforce the choice-of-forum clause. While acknowledging that deference to such clauses was compelled by *The Bremen*, the appellate court argued that the parties here—unlike in *The Bremen*—were in unequal bargaining positions, and that the clause was not bargained for but “presented to the purchaser on a take-it-or-leave-it basis.”⁴¹ Moreover, the court held, the clause could not be upheld under *The Bremen* rationale because the inconvenience of litigating in Florida would “for all practical purposes [deprive them of their] day in court.”⁴² According to the Ninth Circuit, there was “evidence in the record to indicate that the Shutes are physically and financially incapable of pursuing this litigation in Florida.”⁴³

In an opinion by Justice Blackmun, the Supreme Court reversed and enforced the forum-selection clause, finding it unnecessary to reach the personal jurisdiction defense.⁴⁴ The Court noted that as this was an

It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country.

Id. The dissenting opinion in *Carnival* attached a facsimile of three pages to the opinion, *id.* at 1536-38, to demonstrate “that only the most meticulous passenger is likely to become aware of the forum-selection provision.” *Id.* at 1529 (Stevens, J., dissenting).

39. *Shute v. Carnival Cruise Lines, Inc.*, 897 F.2d 377, 387 n.8 (9th Cir. 1990), *rev'd*, 111 S. Ct. 1522 (1991) (describing this aspect of the district court decision).

40. As noted by the Supreme Court, 111 S. Ct. at 1525 n.**, the opinion below was the third filed by the Ninth Circuit. In the second opinion, the court certified a question of personal jurisdiction, concerning the state long-arm statute, to the Washington Supreme Court. The court refiled its opinion upon receipt of the Washington Supreme Court's opinion.

41. 897 F.2d at 388.

42. *Id.* at 389 (quoting *The Bremen*, 407 U.S. at 18).

43. *Id.* The court did not elaborate on this conclusion, either at this point or earlier in the opinion, when it made a similar assertion. *Id.* at 387.

44. *Carnival Cruise Lines v. Shute*, 111 S. Ct. 1522, 1525 (1991). According to the Supreme Court, it granted certiorari “to address the question whether the Court of Appeals was correct in holding that the District Court should hear [the Shutes'] tort claim against [Carnival].” *Id.* More specifically, though, it appears that the case presented the opportunity to resolve two splits of authority. The first, as recounted by the Ninth Circuit, 897 F.2d at 383-86, is over how to determine whether a claim “arises out” of a defendant's activities in the forum state, in order to determine the propriety of exercising specific personal jurisdiction over the defendant. The second, while not specifically mentioned by the Ninth Circuit, was over the validity of

admiralty case federal law governed the enforceability of the clause, and that the Shutes had notice of and knowledge of the clause.⁴⁵ The Court then reviewed its holding and reasoning in *The Bremen*,⁴⁶ and acknowledged that the facts differed from those in *The Bremen*. The Shute-Carnival agreement was a form contract not subject to negotiation and was between parties obviously not in "bargaining parity."⁴⁷

Nevertheless, the Court enforced the choice-of-forum clause. "[W]e must," the Court held, "refine the analysis of *The Bremen* to account for the realities of form passage contracts."⁴⁸ The Court then proceeded to engage in Chicago School economic analysis.⁴⁹ Simply because the form ticket contract was not negotiated does not mean it is never enforceable, since "[i]ncluding a reasonable forum clause in a form contract of this kind well may be permissible"⁵⁰ The Court gave three reasons. First, since a cruise ship typically serves passengers from many fora, a cruise line has an interest in limiting the fora where it might be subject to suit.⁵¹ Second, "a clause establishing ex ante the forum for dispute resolution"⁵² spares litigants the time and expense of forum-related motions. Third, "it [stood] to reason" that passengers purchasing such tickets "benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued."⁵³

Having distinguished the facts of *The Bremen*, the Court also found that the "inconvenience" test of that case was met. The Court stated that there was nothing in the record to support the Ninth Circuit's hold-

choice-of-forum clauses in cruise tickets. See Petition for a Writ of Certiorari at 8-11, *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991). The Third Circuit had taken a less hostile view of such clauses. See *Hodes v. S.N.C. Achille Lauro ed Altrigestione*, 858 F.2d 905 (3d Cir. 1988), *cert. dismissed*, 490 U.S. 1001 (1989). While the *Carnival* majority did not explicitly resolve this split (though it did make passing reference to the *Hodes* case, 111 S. Ct. at 1527), the result of the case clearly favors the *Hodes* view of forum-selection clauses.

45. *Carnival*, 111 S. Ct. at 1525-26.

46. *Id.* at 1526-27.

47. *Id.* at 1527.

48. *Id.*

49. Some writers have taken the Court to task for not consistently engaging in rigorous economic analysis in cases involving contractual, business or regulatory matters. E.g., Frank H. Easterbrook, *The Supreme Court, 1983 Term — Forward: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984). Perhaps it is no coincidence that Justice Blackmun also wrote the Court's opinion in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) (in admiralty cases, economic loss obtainable only under contract, not tort, remedies), a textbook example of Chicago School economic analysis. See Michael E. Solimine, *Recovery of Economic Damages in Products Liability Actions and the Reemergence of Contractual Remedies*, 51 MO. L. REV. 977, 987-88 (1986). Likewise, it is no shock that the *Carnival* opinion also cited Judge Richard Posner's opinion in *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372 (7th Cir. 1990), see *Carnival*, 111 S. Ct. at 1527, discussed *infra*, Part II.C.

50. 111 S. Ct. at 1527.

51. *Id.*

52. *Id.*

53. *Id.*

ing that the inconvenience to the Shutes would be intolerable.⁵⁴ Likewise, the Court held, Florida was not a "remote alien forum," the sort of forum envisioned by *The Bremen* which might justify a finding of inconvenience.⁵⁵ While the "forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness,"⁵⁶ there was no indication of bad-faith by Carnival,⁵⁷ nor that the clause was obtained "by fraud or overreaching."⁵⁸ Indeed, the Shutes "presumably retained the option of rejecting the contract with impunity."⁵⁹ For these reasons, the Court held that the forum-selection clause should be enforced.

In the final part of the opinion, the Court considered the argument, not reached below,⁶⁰ that the clause violated the provisions of a federal statute, the Limited Liability Act,⁶¹ which regulates cruise ship contracts. The Act declares void any contractual provision that exculpates the ship owner from liability, or purports "to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction"⁶² The Court held that neither the plain language nor the legislative history of the statute evinced any Congressional intent to interdict forum-selection clauses. The Court noted that the clause does "not take

54. *Id.* at 1527-28.

55. *Id.* at 1528.

56. *Id.*

57. *Id.* By this, the Court explained that it meant the clause was not "a means of discouraging cruise passengers from pursuing legitimate claims," since Carnival "has its principal place of business in Florida, and many of its cruises depart from and return to Florida ports." *Id.* It is not entirely clear how one follows from the other. Since, presumably, most cruise passengers are not from Florida, those from distant states (or foreign countries) might find it cumbersome to bring suit in Florida. Moreover, passengers may not find it advantageous to litigate on Carnival's home turf. On the other hand, any suit against Carnival is likely to require discovery of Carnival's employees or documentation, both of which should be available to some degree in Florida. And any judgment rendered against Carnival is presumably easily satisfied in that state.

58. *Id.*

59. *Id.*

60. *Shute v. Carnival Cruise Lines, Inc.*, 897 F.2d 377, 389 n.12 (9th Cir. 1990) (discussing but not deciding issue).

61. 46 U.S.C. app. § 183c (1988) (originally enacted as Act of June 5, 1936, ch. 521, sec. 4283B, § 2, 49 Stat. 1480 (1936)).

62.

It shall be unlawful for the . . . owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner . . . from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect.

46 U.S.C. app. § 183c (1988).

away" the Shutes' right to a court trial,⁶³ and the legislative history indicates that the statute was primarily meant to limit arbitration clauses.⁶⁴

Justice Stevens, joined by Justice Marshall, dissented. Recognizing the general rule that contracts, like forum-selection clauses, are usually enforced as written, Justice Stevens argued that "two strands of traditional contract law" qualify this general rule and render this choice-of-forum clause invalid.⁶⁵ One strand subjects contracts of adhesion to a heightened "scrutiny for reasonableness."⁶⁶ Another strand, Justice Stevens stated, is the still "prevailing view," notwithstanding *The Bremen*, that "forum-selection clauses are not enforceable if they were not freely bargained for, create additional expense for one party, or deny one party a remedy."⁶⁷

Moreover, Justice Stevens found the clause in this case easily fell under the purview of the Limited Liability Act. Referring to the language of the Act, he stated that the clause in question "certainly lessens or weakens [the Shutes'] ability to recover" for the tort, since it "is safe to assume" that witnesses can be more easily assembled in Washington than in Florida.⁶⁸ Acknowledging that the Act does not specifically condemn forum-selection clauses, Justice Stevens argued that a "liberal reading" of the Act was supported by its remedial purpose and its legislative history.⁶⁹ Justice Stevens observed that the history demonstrated an intent to protect ship passengers like the Shutes,⁷⁰ and it is not surprising that the history makes no reference to choice-of-forum clauses since at the time of the Act's passage (1936), such clauses were generally unenforceable under the common law.⁷¹

B. Dissenting Voices and Unanswered Questions

The trend in favor of forum-selection clauses has not been unanimously supported. One pre-*Carnival* Supreme Court decision is less solicitous

63. *Carnival*, 111 S. Ct. at 1528.

64. *Id.* at 1529.

65. *Id.* at 1530 (Stevens, J., dissenting).

66. *Id.* at 1530-31. Justice Stevens observed that some commentators, e.g., Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983), argue that due to lack of meaningful consent, contracts of adhesion should not be enforced at all. 111 S. Ct. at 1531. The case law, in contrast, states "a less extreme position and instead subjects terms in contracts of adhesion to scrutiny for reasonableness." *Id.* (citing *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (Wright, J.)).

67. 111 S. Ct. at 1531 (citing Dougherty, *supra* note 32, at 409-38). For similar reasons, Justice Stevens dissented in a personal jurisdiction case on the grounds that the contract between a franchiser and franchisee that provided contacts with the forum state was a contract of adhesion. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 487-90 (1985) (Stevens, J., dissenting).

68. 111 S. Ct. at 1532.

69. *Id.*

70. *Id.* He referred to a House Report which mentioned putting a stop to "arbitration" and to "practices of a like character." *Id.* (quoting H.R. REP. NO. 2517, 74th Cong., 2d Sess. 6-7 (1936)).

71. *Id.*

of such clauses; several states, even in the post-*Bremen* era, still refuse to enforce the clauses; and significant doctrinal questions remain after *Carnival*.

Stewart Organization, Inc. v. Ricoh Corp.,⁷² decided by the Supreme Court three years prior to *Carnival*, involved a dispute arising out of a dealership agreement, which contained a clause directing that all disputes be litigated in a federal or state court in New York City.⁷³ Despite that clause, one of the parties filed suit in diversity in federal court in Alabama, apparently seeking to rely on Alabama law, which disfavors such clauses.⁷⁴ The defendant then filed a motion to transfer the case to federal court in New York under § 1404(a).⁷⁵ At first blush, this scenario seemed to present a classic *Erie*⁷⁶ question of whether federal or state law governed.

The Supreme Court disagreed. The Court found that an extended inquiry was unnecessary, since a federal statute, § 1404(a), was present and was "sufficiently broad" to cover the matter in question.⁷⁷ Section 1404(a) was intended, the Court held, to permit district courts to adjudicate transfer motions "according to an 'individualized, case-by-case consideration of convenience and fairness.'"⁷⁸ As part of that inquiry, a court should consider the presence, or absence, of a forum-selection clause as just one of several factors, state law to the contrary notwithstanding.⁷⁹

In dissent, Justice Scalia observed that § 1404(a) makes no mention of choice-of-forum clauses, and in his view the section is designed to examine present or future facts, not retrospective ones—like a choice-of-forum clause.⁸⁰ Given his conclusion that federal statutory law did not govern the point, Justice Scalia applied the "twin aims" of *Erie*: "discouragement of forum-shopping and avoidance of inequitable administration of the laws."⁸¹ Under those criteria, Justice Scalia concluded that state law regarding forum-selection clauses should govern.⁸²

72. 487 U.S. 22 (1988).

73. *Id.* at 24 & n.1.

74. See *infra* notes 83-86 and accompanying text.

75. That provision states: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1988).

76. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that under the Constitution and the Rules of Decision Act, 28 U.S.C. § 1652 (1988), state substantive law should apply in diversity cases).

77. *Stewart*, 487 U.S. at 26.

78. *Id.* at 29 (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)).

79. *Id.* at 29-30.

80. *Id.* at 34-35 (Scalia, J., dissenting). Justice Scalia also argued that to achieve "substantial uniformity of predictable outcome between federal and state courts," a goal of *Erie* jurisprudence, "a broad reading [of a federal rule or statute] that would create [such disuniformity] should be avoided if the text permits." *Id.* at 37-38.

81. *Id.* at 39 (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)). Justice Scalia's summary of the *Erie* doctrine is consistent with the majority's own review of *Erie* principles. *Id.* at 26-27 & nn.4-6.

82. *Id.* at 39-41.

Stewart illustrated that not all states have embraced *The Bremen's* solicitude toward choice-of-forum clauses. While counts vary,⁸³ it appears that at least four states explicitly reject the modern trend and hold all such clauses invalid per se,⁸⁴ while the case law in several others is unclear.⁸⁵ The rationale of these courts for rejecting *The Bremen* has not been fully explicated. Most of the cases simply reiterate the old view that parties cannot by contract "oust" a court of otherwise competent jurisdiction.⁸⁶

While the opinions are less than inspiring, the results reached have not passed without sympathy in some quarters. Apparently no one adheres to the traditional view holding *all* forum-selection clauses invalid, but some commentators are dubious of the solicitude afforded such clauses. They note that many such clauses appear in contracts of adhe-

83. E.g., Richard D. Freer, *Erie's Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1096 & n.31 (1989) (thirteen states); Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935, 1980 n.216 (1991) (four states); Robert A. de By, Note, *Forum-Selection Clauses: Substantive or Procedural for Erie Purposes*, 89 COLUM. L. REV. 1068, 1071 (1989) (four states); Lederman, *supra* note 5, at 449 n.3 (three states).

84. The four states are: (1) Alabama: *Redwing Carriers, Inc. v. Foster*, 382 So. 2d 554 (Ala. 1980); *Keelean v. Central Bank of the South*, 544 So. 2d 153 (Ala. 1989); (2) Georgia: *Cartridge Rental Network v. Video Entertainment, Inc.*, 209 S.E.2d 132 (Ga. App. 1974); (3) Iowa: *Davenport Mach. & Foundry Co. v. Adolph Coors Co.*, 314 N.W.2d 432 (Iowa 1982); (4) Texas: *Dowling v. NADW Mktg., Inc.*, 578 S.W.2d 475 (Tex. Civ. App. 1979), *rev'd on other grounds*, 631 S.W.2d 726 (Tex. 1982).

Professor Freer lists thirteen states (not including Iowa) that "either expressly or impliedly consider forum-selection clauses invalid per se as a general rule." Freer, *supra* note 83, at 1096 n.31. Three of those states are listed above. In another three states, the rule is unclear. See *infra* note 85. Of the remaining seven states, recent cases have enforced forum-selection clauses. See *Nelms v. Morgan Portable Bldg. Corp.*, 808 S.W.2d 314 (Ark. 1991); *Manrique v. Fabbri*, 493 So. 2d 437 (Fla. 1986); *Funding Sys. Leasing Corp. v. Diaz*, 378 A.2d 108 (Conn. 1977); *Ernest & Norman Hart Bros. v. Town Contractors, Inc.*, 463 N.E.2d 355 (Mass. App. 1984) (dicta); *Chase Third Century Leasing Co. v. Williams*, 782 S.W.2d 408 (Mo. App. 1989); *General Electric Co. v. Keyser*, 275 S.E.2d 289 (W. Va. 1981); *Calanca v. D&S Mfg. Co.*, 510 N.E.2d 21 (Ill. App. 1987).

85. The law of three states is unclear, based on older cases that have not been revisited since *The Bremen*. See *Bartlett v. Union Mut. Fire Ins. Co.*, 46 Me. 500 (1859); *Gaither v. Charlotte Motor Car Co.*, 109 S.E. 362 (N.C. 1921); *Pepin v. Société St. Jean Baptiste*, 49 A. 387 (R.I. 1901). Also, although the law in New York is more recent, it remains unclear. *Jones v. Weibrecht*, 901 F.2d 17, 19 n.1 (2d Cir. 1990) (per curiam) (summarizing case law); *Gruson*, *supra* note 10, at 150-52 (same).

86. E.g., *Redwing Carriers, Inc.*, 382 So. 2d at 556; *Dowling*, 578 S.W.2d at 476; *Cartridge Rental Network*, 209 S.E.2d at 133 (two-paragraph discussion). Cf. *Davenport Mach. & Foundry Co.*, 314 N.W.2d at 436-37 (characterizing *The Bremen* and similar cases as a "growing minority" view and permitting a court to consider a forum-selection clause, "if otherwise fair," along with other factors in ruling on a motion to dismiss on forum non conveniens grounds).

Change may be coming in even these few states. In Alabama, for example, several justices suggested that *Redwing Carriers* be limited to derogation, not prorogation, cases. *Keelean*, 544 So. 2d at 159 (Maddox, J., concurring); *id.* at 159-60 (Steagale, J., concurring). This position, however, was expressly rejected by the majority opinion. *Id.* at 155-56.

sion,⁸⁷ and, more generally, that due-process values are sacrificed when courts treat the clauses as they would any other contractual provision.⁸⁸

Even accepting *The Bremen* and its progeny, several significant doctrinal issues remain unresolved. Among these questions are: whether federal law governs enforcement of a clause in a diversity action when § 1404(a) is not applicable;⁸⁹ whether federal law governs this issue in a federal question case;⁹⁰ what the content of a federal rule should be, in light of *Carnival*; what relevance a choice-of-law clause has to a forum-selection clause;⁹¹ and whether enforcing a forum-selection clause waives a party's use of other jurisdictional devices, such as reliance on the forum non conveniens doctrine.⁹² The balance of this Article turns to these and other questions.

II. Waiving Jurisdictional Rights Through Forum-Selection Clauses

A. Waiver of Personal Jurisdiction Protections and of the Option to Forum-Shop

The Supreme Court has frequently held that the litigant can waive "personal" constitutional rights but not "structural protections" embodied in the Constitution.⁹³ This general paradigm is plagued by a number of uncertainties. For example, the line dividing personal rights from structural concerns is not clear.⁹⁴ Nor is the content of the required waiver certain.⁹⁵ Finally, it is not clear what significance, if any, should be

87. *E.g.*, RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 156-57 (3d ed. 1986); Mullenix, *supra* note 25, at 362.

88. *E.g.*, Mullenix, *supra* note 25, at 296-97.

89. *See* Stein, *supra* note 83, at 1961 n.132; de By, *supra* note 83, at 1069; Freer, *supra* note 83, at 1117; Northwestern Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 374 (7th Cir. 1990). The majority in *Stewart* left this issue open. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 n.11 (1988).

90. An issue left open in *Stewart*, 487 U.S. at 26 n.3. *See also* Mullenix, *supra* note 25, at 299, 313.

91. *See* Mullenix, *supra* note 25, at 301.

92. *Id.*

93. *See* Peretz v. United States, 111 S. Ct. 2661, 2669 (1991); Freytag v. Commissioner, 111 S. Ct. 2631, 2638-39 (1991); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848-50 (1986). *But see* Freytag, 111 S. Ct. at 2647-50 (Scalia, J., concurring) (some structural guarantees can be waived).

94. *See* Freytag, 111 S. Ct. at 2650 (Scalia, J., concurring) (observing that "which constitutional provisions are 'structural' . . . is by no means clear."). *Cf.* Dennis v. Higgins, 111 S. Ct. 865, 870-71 (1991) (discussion of same distinction).

95. For example, most criminal cases require that there be an "intentional relinquishment . . . of a known right . . ." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In contrast, waivers in civil cases seem to be governed, in whole or in part, by contract law principles. *E.g.*, *Town of Newton v. Rumery*, 480 U.S. 386, 392-94 (1987). *See generally* Edward L. Rubin, *Toward A General Theory of Waiver*, 28 UCLA L. REV. 478, 491-528 (1981) (noting this dichotomy and giving numerous examples of each); Judith A. McMorrow, *Who Owns Rights: Waiving and Settling Private Rights of Action*, 34 VILL. L. REV. 429, 440-49 (1989) (noting apparent distinction even within civil cases; some cases (*e.g.*, *Rumery*) utilize contract principles while other cases (*e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991)) focus on the public interests of the right sought to be waived); *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1397 (9th Cir.), *cert. denied*, 111 S. Ct. 2892 (1991) (higher standard of

attached to a waiver prior to litigation as compared to a post-filing waiver or settlement.⁹⁶

To address these concerns, it is necessary to identify and examine the nature of the rights waived in a forum-selection clause. In any lawsuit, the parties may have the option of suing each other in different fora. A choice-of-forum clause limits the opportunity to shop for a forum by preselecting one forum (or the courts in one state or jurisdiction) in which to litigate a dispute.

Most of these clauses also appear to waive rights to invoke the protections of personal jurisdiction. Those protections, derived from the Due Process Clauses of the Constitution, generally require that a state have "minimum contacts" with a defendant to enable it to adjudicate a civil dispute involving that party.⁹⁷ Such protections can be explicitly waived; of the examples discussed so far, the waiver in *Szukhent* comes the closest.⁹⁸ On the other hand, the clauses in *The Bremen*, *Stewart* and *Carnival* did not explicitly waive the minimum contacts barrier. Nonetheless, the clauses would not be effective unless the minimum contacts barrier is considered to be waived. It does no good to preselect the forum if one party can still contest personal jurisdiction or other venue requirements.⁹⁹

To what extent *should* personal jurisdiction and venue requirements be waivable? It is well settled that a litigant may waive personal jurisdiction, but may never waive subject-matter jurisdiction.¹⁰⁰ But why the

court review of settlement in civil cases may be appropriate for waiving constitutional, as opposed to statutory, rights).

96. Compare *Cange v. Stotler & Co., Inc.*, 826 F.2d 581, 594 n.11 (7th Cir. 1987) (arguing that prospective waivers of substantive statutory rights can "encourage violations of the law," and are to be distinguished from settlements of a dispute) and *McMorrow*, *supra* note 95, at 463-65 (waiver is more problematic than settlement since plaintiff is usually in a stronger bargaining position in the latter situation) with *Cange*, 826 F.2d at 596 (Easterbrook, J., concurring) (arguing that case law does not reflect a distinction between settlements and waivers, nor should it, since "[t]o forbid the contractual waiver is to make the class of statutory beneficiaries worse off, by depriving them of the opportunity to obtain the benefits of the statutory entitlement by using it as a bargaining chip in the process of contracting.") See also *Freitag*, 111 S. Ct. at 2647 n.2 (Scalia, J., concurring) (noting distinction between waiver and forfeiture and arguing that cases do not make distinction clear); *General Contracting & Trading Co., LLC v. Interpole, Inc.*, 940 F.2d 20, 22-23 (1st Cir. 1991) (discussing distinction between waiver of and consent to personal jurisdiction).

97. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny.

98. See *supra* notes 18-20 and accompanying text. The majority opinion read the clause, authorizing an agent to accept service of process in New York, to "subject the respondents to the jurisdiction of the federal court in New York." *National Equip. Rental v. Szukhent*, 375 U.S. 311, 313 (1964) (footnote omitted).

99. See BORN & WESTIN, *supra* note 5, at 175 n.16 ("Exclusive forum-selection clauses will typically be interpreted as implicit submissions to the forum's jurisdiction."); *Northwestern Nat'l Life Ins. Co. v. Donovan*, 916 F.2d 372, 376-77 (7th Cir. 1990). Ultimately, the issue comes down to one of contract interpretation. Part II.B. *infra* argues that state contract law should usually apply.

100. Compare FED. R. Civ. P. 12(h)(1) ("A defense of lack of jurisdiction over the person . . . is waived" if not raised in a motion or in a responsive pleading) with FED.

difference? Why should not *both* be waivable, as some have argued?¹⁰¹ The answer usually given is that federal courts are tribunals of limited jurisdiction as determined by Congress under Article III of the Constitution. To permit subject-matter jurisdiction to be waived would flout this limitation. On the other hand, personal jurisdiction is, as the term implies, a personal right waivable by the individual.¹⁰²

This traditional answer seems unsatisfactory because subject-matter limitations ultimately benefit the individual.¹⁰³ Perhaps a better explanation proceeds along the personal right/structural guarantee dichotomy suggested above. Subject-matter jurisdiction is a separation-of-power limitation between the legislature and the courts. To permit such a structural barrier to be breached, even with consent of the parties, would upset the checks and balances inherent in separation of powers.¹⁰⁴ Waiver of subject-matter jurisdiction thus subjects non-litigants to externalities. In contrast, a prospective litigant waiving a personal-jurisdiction protection in large part only impinges upon herself.¹⁰⁵

The alternative method of examining waivable and non-waivable jurisdictional rights sheds light on the nature of the rights being waived by a forum-selection clause. While the traditional view holds that these clauses do waive such rights, the consensus on that position is by no means unanimous. Returning to personal jurisdiction, at one point the Court seemed to think that personal-jurisdiction guarantees, while

R. Civ. P. 12(h)(3) (lack of subject-matter jurisdiction can be raised at any time or by the court). See also *Peretz v. United States*, 111 S. Ct. 2661, 2678 (1991) (Scalia, J., dissenting) ("One of the hoariest precepts in our federal judicial system is that a claim going to a court's subject-matter jurisdiction may be raised at any point in the litigation by any party.")

101. See, e.g., AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 366-69 (1969); Robert J. Martineau, *Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse*, 1988 B.Y.U. L. REV. 1, 33-34.

102. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 13, 181 (1985). Similar reasoning would presumably apply to the subject-matter jurisdiction of state courts. Martineau, *supra* note 101, at 2.

103. As the Court itself seems to have recognized:

The challenge in this case goes to the subject-matter jurisdiction of the court and hence its power to issue the order. The distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of the government, must respect the limits of their authority.

United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 77 (1988). See also Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991).

104. Cf. *Freytag*, 111 S. Ct. at 2648 (Scalia, J., concurring) (identifying subject-matter jurisdiction as a nonwaivable structural guarantee).

105. Cf. Lucian A. Bebchuk, *The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395, 1405-08 (1989) (similar analysis regarding when corporations may contract around rules of corporate law); Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1434 (1989) (same).

mainly protecting individual interests, also served to police state sovereignty.¹⁰⁶ The Court has since retreated from this position to hold that personal jurisdiction flows not from Article III, but from the Due Process Clause, and thus constitutes a waivable liberty interest.¹⁰⁷ In this context, consensual waiver, as reflected in a choice-of-forum clause, seems unremarkable.¹⁰⁸

Perhaps doctrine too quickly abandoned the horizontal federalism, or structural, prong of personal jurisdiction. Emphasizing state sovereignty concerns can help ensure, entirely apart from the parties' consent, that the forum is an appropriate place to adjudicate the dispute¹⁰⁹ and that courts consider state regulatory interests in determining whether the Due Process Clause is satisfied.¹¹⁰ Likewise, insisting that the defendant have minimum contacts with the forum state, notwithstanding a particular litigant's consent, helps reduce the number of instances when a state will impose costs of defending suit on out-of-state defendants.¹¹¹ But even accepting this analysis does not render consensual jurisdiction problematic. The strength of these federalism interests can be overstated. They are most often invoked by private litigants, and

106. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94 (1980).

107. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.13 (1985); *Insurance Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982).

108. One writer has recently argued that incoherency in the Court's personal-jurisdiction jurisprudence demonstrates that current doctrine "is really a solution in search of a problem." Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 530 (1991). The problem stems principally from the Court's embrace of an imagined exchange of consent, between defendant and the forum state, as the rationale for the minimum contacts requirement. See Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 699-703 (1987). Alternative rationales—such as the state's regulatory interest, or simply the convenience to the defendant—have been deemphasized. *Id.* at 698-99, 703-08. On the other hand, the consent rationale is also problematic, largely because the exchange is wholly fictitious. *Id.* at 734-38. For these reasons, some writers have posited still other rationales for personal-jurisdiction requirements, from a focus on the coercive power a state may exercise over a defendant, e.g., Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1 (1989), to a focus on burdening and discriminating against outsiders not represented in the forum's political process, e.g., Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 881 (1989). See generally Perdue, *supra*, at 534-60 (summarizing and critiquing new approaches).

What is remarkable about these varied rationales for personal-jurisdiction requirements is that all approve of valid or explicit consent—as embodied in a forum-selection clause—as the basis for the assertion of personal jurisdiction over a defendant. See, e.g., Brilmayer, *supra*, at 24; Stein, *supra*, at 735. Cf. Perdue, *supra*, at 537.

109. Margaret G. Stewart, *A New Litany of Personal Jurisdiction*, 60 U. COLO. L. REV. 5, 11 (1989).

110. Stein, *supra* note 108, at 738-56. Indeed, the Court purports to consider such interests when determining the overall reasonableness of an assertion of personal jurisdiction. *Burger King*, 471 U.S. at 477.

111. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 609-10 (3d ed. 1986); Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 94-96.

rarely, if ever, by state officials.¹¹² Moreover, the regulatory interests emphasized by a federalism approach are served when a litigant agrees to submit to jurisdiction in that state.¹¹³

The other right waived in a forum-selection clause is the possible option to forum shop. Forum shopping has gotten a bad name in some circles, primarily because it undermines the illusion that litigants will be treated identically in any forum.¹¹⁴ But forum shopping can be conceptualized as the simple search for a convenient and favorably biased forum,¹¹⁵ a search not unfair to a defendant absent some predetermined baseline of fairness.¹¹⁶

Forum shopping, which some have spoken of in fairly lyrical terms,¹¹⁷ does not appear to spring from positive sources of law. It is simply the manifestation of litigant autonomy, and the by-product of a jurisdictional system that often provides numerous fora to bring suit.¹¹⁸ More so than personal jurisdictional rights, the option to forum shop is a personal right with few, if any, structural attributes. Few externalities are likely to be created if forum shopping is curtailed, especially when the creation and enforcement of choice-of-forum clauses is, itself, viewed as one form of forum shopping.¹¹⁹ Therefore, the right to

112. *But see* Stein, *supra* note 108, at 745 (judge acts as agent of state and exercises regulatory authority of forum when deciding personal-jurisdiction questions).

113. *Id.* at 756.

114. *See* Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1680-84 (1990) (giving examples of traditional disfavor).

115. Perdue, *supra* note 108, at 560-73 (litigants care about convenience, bias, and choice of law).

116. BRILMAYER & MARTIN, *supra* note 20, at 21; R. LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* 178-79 (1991); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 313 n.117 (1990).

To be truly even-handed, one might argue that there should be an auction system to enable the parties to purchase the appropriate forum. Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 608 n.11 (1981). Enforcing contractually created forum-selection clauses is one type of auction system.

117. *See, e.g.*, Mullenix, *supra* note 25, at 303 (right to choose a forum "is perhaps the most fundamental and essential litigation right, since it carries with it choice-of-law determinants"); *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 325 (1964) (Black, J., dissenting) ("The right to have a case tried locally and be spared the likely injustice of having to litigate in a distant or burdensome forum is as ancient as the Magna Charta.") (footnote omitted).

118. *See* ROBERT M. COVER ET AL., *PROCEDURE* 1416-17 (1988); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 306 (1988).

119. Note, *supra* note 114, at 1680, 1688 n.86.

When a state's substantive law is favorable to certain litigants, that state, through forum shopping, will attract litigation. Thus, "[b]y having power over defendants and by catering to plaintiffs, a state can effectuate its own policies without accommodating the needs of other states." BRILMAYER, *supra* note 116, at 178. Whether this phenomenon should be characterized as a race to the top or a race to the bottom is a difficult and uncertain decision. *Id.* at 178-79. *See also* Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49, 69-70 (1989) (noting similar difficulties in characterizing states' adoption of modern choice-of-law theories); *supra* note 116.

forum shop should be waivable in such clauses.

Concluding that certain rights can be waived in a choice-of-forum clause leaves open the questions of the standards to apply when considering the validity of particular clauses, as well as the appropriate source of law for those standards. It is to those issues to which the balance of this Part of the Article turns.

B. Sources of Law: Federal Common Law or State Law

As noted above,¹²⁰ the Supreme Court has not directly addressed whether federal common law, as embodied in *The Bremen* analysis, governs the validity of forum-selection clauses in diversity or federal question cases, or whether reference to state law is appropriate. The question is not merely academic for, as we have seen, a few states still cling to the older view, rejected by *The Bremen*, of refusing to enforce any choice-of-forum clause, or not favor such clauses to the extent that the *Bremen* did.¹²¹ If federal common law does govern forum-selection clauses in these cases, *The Bremen* rule would govern *all* cases in federal court as well as federal question (and perhaps other) cases brought in state court.¹²²

To the extent one views forum shopping favorably, the enforcement of forum-selection clauses arguably limits—though does not entirely discard—such shopping. Perhaps such a regime does create some externalities, since a state will be deprived of forum shopping plaintiffs, routed elsewhere through the choice-of-forum clause. But these externalities should cancel out, since the aforementioned state can be the recipient of litigation through the enforcement of such clauses. A response is that defendants with greater bargaining power, as in *Carnival*, will prepare forum-selection clauses to route litigation to states with law more favorable to defendants. The paradigm of unequal bargaining power in this context is not universal, of course (see *The Bremen* and *Stewart*), and it is not clear how many clauses typically fall into one category as opposed to the other.

At any rate, permitting individuals to waive the option to forum shop, a waiver process policed by the courts, *see infra* Part II.C., is apt to have some positive and negative externalities. The difficulties in sorting out the competing concerns suggest that forum shopping is more personal than structural, and thus is waivable.

120. *See supra* notes 89-90 and accompanying text.

121. *See supra* notes 83-86 and accompanying text.

122. For federal question cases brought in state court, *The Bremen* federal common law rule would undoubtedly preempt a contrary state rule, at least if the state law were held to frustrate the objectives of the federal rule. *See* *Howlett v. Rose*, 110 S. Ct. 2430, 2443 (1990). Similarly, the federal common law rule may have enough preemptive force to govern in *all* cases brought in state court. *Freer, supra* note 83, at 1130-31 n.206.

These conclusions seem to flow from the initial assumption that there should be a federal common law rule, embodying *The Bremen*—an assumption I question below. But even if this assumption is correct, it does not necessarily follow that this common law rule would govern even in state court, or at least non-federal question state court cases. The contrary state rule would have to frustrate the purpose of *The Bremen*'s solicitude toward forum-selection clauses. Merely because the rules differ—and might result in different outcomes—does not, in itself, demonstrate such frustration. *Robertson v. Wegmann*, 468 U.S. 584, 593 (1978). Rather, the inconsistency between federal and state interests must flow from perceived inhospitability to federal interests or discrimination against parties seeking to enforce federally-secured rights. Michael E. Solimine, *Enforcement and Interpretation of Settlements of Federal Civil*

Most lower courts that have addressed these issues have held that *The Bremen* analysis embodies a federal common law rule that operates outside the admiralty context, and applies to both diversity and federal question cases.¹²³ Both conclusions are incorrect.

1. Diversity Cases

Justice Scalia's dissenting opinion in *Stewart*¹²⁴ provides the starting point for determining whether federal or state law governs the validity of a forum-selection clause in a diversity case. As outlined above, Justice Scalia rejected the majority's position that the federal transfer statute governed the case.¹²⁵ Given that conclusion, the appropriate analysis under the Rules of Decision Act¹²⁶ asks whether the application of a judge-made federal rule (such as *The Bremen*) would encourage forum shopping or lead to the inequitable administration of the laws. Justice Scalia concluded that both results would follow, thus mandating that state law govern forum-selection clauses.

Justice Scalia's analysis seems sound. Clearly, a litigant seeking either to enforce or to avoid a forum-selection clause will shop for a forum that either enforces or does not enforce such clauses. Moreover, applying federal law can discriminate against a non-resident defendant who cannot remove¹²⁷ a case to federal court. It is not surprising that

Rights Actions, 19 RUTGERS L.J. 295, 330-31 (1988). A generalized federal interest in enforcing forum-selection clauses—as policed by the criteria of *The Bremen* and *Carnival* tests—would seem to clash with a per se rule holding all such clauses invalid (e.g., as in Alabama, *supra* note 84). On the other hand, a state rule which embodies a *rebuttable* presumption against such clauses, as seems to be the case in Iowa and New York, *see supra* notes 84-85, does not seem enough of a fundamental clash with federal interests to justify entirely preempting those state rules.

Despite the generally accepted view that there is a federal common law rule in favor of forum-selection clauses, *see infra* note 123, no state court opinion appears to have addressed the argument that its own rule—whatever it may be—is entirely preempted by federal law.

123. *See* AVC Nederland B.V. v. Atrium Inv. Partnership, 740 F.2d 148, 156 (2d Cir. 1984) (federal securities laws); Bense v. Interstate Battery Sys. of America, Inc., 683 F.2d 718, 720-21 (2d Cir. 1982) (federal antitrust laws); Jones v. Weibrecht, 901 F.2d 17, 18 (2d Cir. 1990) (per curiam) (diversity, federal question); Manetti-Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509, 512 (9th Cir. 1988) (diversity); Mercury Coal & Coke, Inc. v. Mannesmann Pipe and Steel Corp., 696 F.2d 315, 317-18 (4th Cir. 1982) (diversity); Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066, 1068 (11th Cir. 1987) (per curiam) (en banc) (diversity), *aff'd on other grounds*, 487 U.S. 22 (1988). *But see* General Eng. Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 356-57 (3d Cir. 1986) (diversity, state law controls); Alexander Proudfoot Co. World Headquarters v. Thayer, 877 F.2d 912, 916-19 (11th Cir. 1989) (same). *Cf.* Northwestern Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 374 (7th Cir. 1990) (noting split in diversity cases but finding it unnecessary to resolve issue).

124. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 34-35 (1988) (Scalia, J., dissenting). *See supra* Part I.B.

125. It is difficult to argue that Federal Rule of Civil Procedure 12(b)(3)—governing motions to dismiss for lack of venue—covers the issue of whether forum-selection clauses are enforceable. Stein, *supra* note 83, at 1980 n.220; de By, *supra* note 83, at 1075-76. *Cf.* Mullenix, *supra* note 25, at 327-29.

126. 28 U.S.C. § 1652 (1988).

127. 28 U.S.C. § 1441(a) (1988).

commentators generally support Scalia's position.¹²⁸

Justice Harlan's Rules of Decision Act analysis leads to the same result.¹²⁹ If the state rule "substantially affect[s] those primary decisions respecting human conduct which our constitutional system leaves to state regulation,"¹³⁰ then state law should apply. Ex ante consideration of a difference between federal and state law on choice-of-forum clauses may well affect commercial decisions to enter certain geographic markets. The uncertainty is exacerbated by potential litigants' lack of knowledge of the forum where the battle will take place.¹³¹ Concern over forum-selection clauses is thus a "primary decision" by prospective litigants, and state law governing that concern ought to be applied in diversity actions in federal court.

2. *Federal Question Cases*

Because federal question cases are predicated on statutes that are silent on the issue of choice-of-forum clauses, courts must resort to federal common law to fill the gap.¹³² Principles for the creation of federal

128. E.g., Freer, *supra* note 83, at 1140; Lederman, *supra* note 5, at 452-55; Mullenix, *supra* note 25, at 338; de By, *supra* note 83, at 1080-81. See also Earl M. Maltz, *Choice of Forum and Choice of Law in the Federal Courts: A Reconsideration of Erie Principles*, 79 Ky. L.J. 231, 251-52 (1990-91) (arguing that *Erie* principles should inform application of § 1404(a) in this context, particularly given opportunity for forum shopping).

Some might argue that this analysis undervalues federal interests at stake. Such an argument might draw on *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), a Rules of Decision Act case that employed a balancing of state and federal interests. See MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 219-25 (2d ed. 1990) (arguing for continued use of *Byrd*-type balancing in Rules of Decision Act cases); Stein, *supra* note 83, at 1966-67 (advancing argument in context of forum-selection clauses); Freer, *supra* note 83, at 1140-41 (positing but rejecting this argument). Indeed, it is just this sort of argument that appears to account for some of the cases on the impressive list which applies federal law in diversity cases. See *supra* note 123. E.g., *Manetti-Farrow*, 858 F.2d at 512.

This argument, however, faces several significant barriers. Doctrinally, *Byrd*, while never expressly overruled, is moribund. It went unmentioned in all the opinions in *Stewart*, and in the Court's more recent Rules of Decision Act jurisprudence. See *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2136-38 (1991). The argument fails to recognize that *Hanna v. Plumer*, 380 U.S. 460 (1965), as reconfirmed by dicta in the *Stewart* majority opinion, departed from the *Byrd* balancing test. De By, *supra* note 83, at 1077-78.

At any rate, a federalism approach does not necessarily mean that state law should be discarded in this context. There are significant regulatory interests served by a state law that does not enforce choice-of-forum clauses—such as the interest in regulating conduct by defendants—which are worthy of deference by a federal diversity court. See Stein, *supra* note 83, at 1975-76. See also Freer, *supra* note 83, at 1138-40 & n.241 (arguing federal interest is slight or nonexistent in this regard).

129. *Hanna v. Plumer*, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring).

130. *Id.* at 475. The Harlan test has been invoked by the Court in other contexts. E.g., *Kamen v. Kemper Fin. Serv., Inc.*, 111 S. Ct. 1711, 1716 (1991) (applying "substantive rights" proviso of the Rules Enabling Act, 28 U.S.C. § 2072(b) (1988)).

131. Stein, *supra* note 83, at 1951; de By, *supra* note 83, at 1081-82.

132. Two federal statutes, 42 U.S.C. § 1988 (1988) and the aforementioned Rules of Decision Act, 28 U.S.C. § 1652 (1988), might be thought to command application of state law in these circumstances. Section 1988, enacted as a companion provision to the civil rights statutes of the Reconstruction Era, provides that where federal law

common law are relatively well-settled. As the Court reiterated last Term, "the interstices of federal remedial schemes [should be filled] with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards,"¹³³ and state law should ordinarily be incorporated as the federal rule of decision unless state law "would frustrate specific objectives of the federal programs."¹³⁴ The latter presumption is especially strong "in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards."¹³⁵

The application of these standards demonstrates that a federal common law favoring forum-selection clauses need not be created for federal question cases (other than admiralty cases governed by *The Bremen* and *Carnival*) or, if it is, state law should be incorporated as the rule of decision. At the outset, it is useful to restate the parameters of the debate. Federal common law, as reflected in *The Bremen* and *Carnival*, favors the enforcement of choice-of-forum clauses, and almost all the states follow this view. A handful of states either hold such clauses unenforceable per se or seem to apply a presumption against their validity. Plaintiffs filing federal question cases can, by design or accident, find themselves either in federal or state court. Should federal law govern the validity of their claims as well?

It is difficult to see how application of state law in these circumstances would violate specific federal interests. The mere existence of the federal statute creating a private cause of action should not be considered, by itself, a sufficient reason.¹³⁶ Rather, the purpose of the federal law should be examined. On that score, most federal statutes empowering private plaintiffs to bring suit probably employ some mixture of remedial and deterrence rationales.¹³⁷ To give full force to these objectives, we presumably should give plaintiffs the opportunity to forum shop, to enable them to choose the most favorable and conve-

is "deficient" state law will govern to the extent that it "is not inconsistent" with federal law. The Rules of Decision Act states that: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (1988). While not unanimous, see Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 Nw. U. L. Rev. 761 (1989), the prevailing view is that neither statute inhibits appropriate creation of federal common law. See Louise Weinberg, *Federal Common Law*, 83 Nw. U. L. Rev. 805 (1989); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 903-05 (1986); Solimine, *supra* note 122, at 322 (citing other authorities).

133. *Kamen v. Kemper Fin. Serv., Inc.*, 111 S. Ct. 1711, 1717 (1991).

134. *Id.* (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979)).

135. *Id.* See generally Solimine, *supra* note 122, at 323.

136. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635-37 (1985). See also *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 39 (1988) (Scalia, J., dissenting); REDISH, *supra* note 128, at 125.

137. *E.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 444 n.4 (1983) (describing compensation and deterrence functions of civil rights statutes); *Mitsubishi*, 473 U.S. at 635-36 (same with respect to antitrust laws).

nient court.¹³⁸ Ironically, to the extent forum-selection clauses reduce the opportunity to forum shop, enforcement of a clause *undercuts* this federal interest.¹³⁹

Determining whether state law would undermine or be inconsistent with federal interests is also informed by the law's novelty, whether it unjustifiably burdens a plaintiff pursuing federally secured rights, or whether it discriminates against such plaintiffs.¹⁴⁰ Application of these factors does not lead to the conclusion that state law disfavoring choice-of-forum clauses is inconsistent with federal interests. State law rejecting *The Bremen* test is relatively rare, but hardly aberrant. It stems from a long-standing practice only recently abandoned by federal and other state courts, and it is not devoid of logical underpinnings. The "ouster" theory is anachronistic, but a state may wish to exercise its legislative jurisdiction (over a case otherwise within its judicial jurisdiction) to regulate conduct of defendants, to benefit residents, or to enforce a policy against adhesion contracts.¹⁴¹ Similarly, refusing to enforce such clauses across the board can hardly be said to discriminate against federal plaintiffs, or (for the reasons given above) hinder the exercise of federal rights.¹⁴²

The other prong of federal common lawmaking focuses on the need for nationwide, uniform standards. That current state law regarding choice-of-forum clauses is not unanimous does not necessarily establish the need for uniformity.¹⁴³ Rather, there must exist a danger of interstate spillovers, that is, of states burdening non-residents or of dis-

138. See Chemerinsky, *supra* note 118, at 306; Richard B. Saphire & Susan W. Brenner, *The Effect of the Ohio Court of Claims Act on Civil Rights Actions in State and Federal Courts*, 22 U. Tol. L. Rev. 167, 168-69 (1991); Susan E. Powley, Note, *Exploring a Second Level of Parity: Suggestions for Developing an Analytical Framework for Forum Selection in Employment Discrimination Litigation*, 44 VAND. L. REV. 641 (1991).

Forum shopping is usually conceptualized as being among the fifty states, or between federal and state courts. It is rarely thought of as being between federal courts in different jurisdictions, perhaps because (at least in federal question cases) these courts are thought to be applying a uniform body of law. While nominally true, geographic differences in the resolution of federal claims undoubtedly exist and this can drive forum shopping in federal question cases. See Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1584-94 (1989); Charles R. Epp, *Connecting Litigation Levels and Legal Mobilization: Explaining Interstate Variation in Employment Civil Rights Litigation*, 24 LAW & SOC'Y REV. 145 (1990); Peter Siegelman, *Another Look at Employment Discrimination Litigation: A Reply to Epp* (ABF Working Paper #9005) (on file with author).

139. See Stein, *supra* note 83, at 2005; *Red Bull Assocs. v. Best Western Int'l, Inc.*, 862 F.2d 963, 966 (2d Cir. 1988). *Red Bull* specifically concerned a transfer motion under § 1404(a), but its logic seems to apply with full force outside the confines of a transfer motion. The case is critically discussed *infra*, Part III.B.

140. Solimine, *supra* note 122, at 332-33.

141. Freer, *supra* note 83, at 1136-1139; Stein, *supra* note 83, at 1971-85.

142. One can posit situations where the plaintiff, seeking to enforce a federal right, wishes to enforce a forum-selection clause. Putting aside the fact that this circumstance seems practically nonexistent in the case law, the presence of such scenarios does not detract from the wishes of a similarly situated plaintiff to avoid such clauses.

143. For example, in *Kamen v. Kemper Financial Services, Inc.*, 111 S. Ct. 1711 (1991), the Court refused to fashion a federal common law to govern the demand

rupting interstate commerce or other relationships. This view of uniformity has been advanced by commentators¹⁴⁴ and increasingly accepted by the Court, as well.¹⁴⁵

Two examples drawn from contract law will illustrate this point. The Court, in justifying the creation of a federal common law to govern collective bargaining agreements, has emphasized the difficulties of subjecting such agreements to varying state law interpretations.¹⁴⁶ Since many unions and employers have offices in more than one state, differing interpretations of union contracts could affect interstate commerce.¹⁴⁷ On the other hand, some lower courts have held that disputes over the interpretation of settlements of federal civil rights actions should be controlled by state law,¹⁴⁸ a result justifiable since most such disputes involve few if any interstate spillovers.¹⁴⁹

At first blush, application of an interstate externality approach to forum-selection clauses seems to demand uniformity. By definition, most clauses involve parties and courts from more than one state. Whether or not such clauses are enforced, they implicate interstate interests. In *Carnival*, for example, a Washington plaintiff is unable to litigate her claim against a Florida defendant in Washington courts, and must do so in Florida. A state declining to enforce such a clause deprives another state court system of a case, and burdens a defendant who may be a non-resident.¹⁵⁰

Although this scenario demonstrates lack of uniformity, it does not necessarily compel creation of federal common law. To be sure, those states that refuse to enforce choice-of-forum clauses may not be acting

requirement in shareholder derivative litigation based on federal law, despite the fact that state law widely differs on the question. *Id.* at 1719.

144. E.g., DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 75-76 (1991); RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 183-84 (1985); Solimine, *supra* note 122, at 326-27.

145. E.g., *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2779 (1991) (in determining whether federal common law should supply uniform statute of limitations for securities claims, court "should accord particular weight to the geographic character of the claim . . ."); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987) ("multistate nature of [the federal cause of action] indicates the desirability of a uniform federal statute of limitations.").

146. *International Bhd. Elec. Workers v. Hechler*, 481 U.S. 851, 856-57 (1987); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962).

147. Solimine, *supra* note 122, at 328.

148. There is a split of authority on this issue. Compare *Fulgence v. J. Ray McDermott & Co.*, 662 F.2d 1207 (5th Cir. 1981) (per curiam) (federal law controls) with *Dhaliwal v. Woods Div., Hesston Corp.*, 930 F.2d 547, 548 (7th Cir.) (state law controls), *cert. denied*, 112 S. Ct. 194 (1991). For a lengthier list of cases on point, see Solimine, *supra* note 122, at 319 & n.120.

149. Solimine, *supra* note 122, at 326-28. See also *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987) ("the typical § 1983 suit . . . most commonly involves a dispute wholly within one State.").

150. Similar considerations seem to follow if the clause directs litigation into foreign jurisdictions. See *infra* Part III.C.

out of wholly altruistic motives. As suggested above,¹⁵¹ such states may be primarily interested in generating business for state lawyers and protecting state residents, perhaps at the expense of non-residents. A uniform law might be appropriate if these were the only motivations or the principal results of the case law of the states that refuse to enforce the clauses. But the jurisprudence of these states does not support this conclusion. All purport to apply their doctrine evenhandedly. Refusing to enforce such clauses can work to the benefit of a resident (if that person is seeking to avoid the effect of the clause) *or* of a non-resident (if that person, too, is attempting to avoid the clause).¹⁵²

Nevertheless, a less sanguine observer might suspect that the states refusing to enforce choice-of-forum clauses are largely or exclusively driven to help residents at the expense of non-residents. Presumably, under this explanation this situation existed in *all* the states, decades ago, when the uniform rule was to hold such clauses invalid. If these assumptions are true, it would make little sense for state *A* to enforce such clauses, sending one of its residents to the courts of state *B*, when state *B* will not reciprocate and enforce a clause and require its residents to litigate in state *A*. The fifty states would seem to have been caught in a prisoner's dilemma.¹⁵³

Yet in reality this has not occurred. As we have seen, the states have gradually abandoned the old rule in the latter part of this century; only a handful of states declare forum-selection clauses invalid *per se*. This evolution seems to be a textbook example of reciprocity.¹⁵⁴ States

151. See *supra* note 141 and accompanying text. These motivations (as well as others) undoubtedly underlie choice-of-forum statutes, as well. See *infra* Part III.A.

In analyzing the reasons that might motivate states to refuse to enforce forum-selection clauses, Professor Stein has called for an examination of the law in *each* such state. Stein, *supra* note 83, at 1982. The reason, according to him, is that certain rationales—such as reliance on the “ouster” theory—are not entitled to deference by a federal court, while other, regulatory rationales are. *Id.* The problem with the state-by-state approach, as Stein recognizes, *id.* at 1975, is that the purported rationale(s) are next to impossible to cull from the published cases. See *supra* notes 85-86 and accompanying text. Thus, the better approach is to focus on the likely rationales and effects of the state rule, see Gregory S. Alexander, *The Concept of Function and the Basis of Regulatory Interests Under Functional Choice-of-Law Theory: The Significance of Benefit and the Insignificance of Intention*, 65 VA. L. REV. 1063, 1079-80 (1979); Solimine, *supra* note 119, at 66, as a presumptive rule, and permit litigants to bring to a court's attention what might be the “actual” rationale or effects.

152. It is also possible that neither party would be a resident, or that both are residents.

153. The classic prisoner's dilemma concerns two prisoners who cannot communicate with each other. Each can be silent (cooperate) or inform on the other. If one informs and the other does not, then the first goes free while the other receives a long jail term. If both inform, each will get a moderately long jail term, and if both remain silent, then each will get a shorter term. Thus, each has an incentive to inform, even though they would *both* be better off if they remained silent. BRILMAYER, *supra* note 116, at 156. For an application of the prisoner's dilemma paradigm to choice-of-law issues, see *id.* at 156-58; Kramer, *supra* note 116, at 341-42; Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 55-58 (1991).

154. There are two types of reciprocity—specific and diffuse. Under the former, benefits are extended with the understanding that other benefits will be extended in

escape the prisoner's dilemma by taking a chance on cooperation, by enforcing a clause and sending a resident to litigate in another state. The state hopes that the other state will do likewise when faced with the other side of the coin. If the second state refuses to cooperate (or reneges on an initial cooperative decision), then the first can change its mind and go back to the old approach.¹⁵⁵ Eventually, by successively playing these games, all the states will begin to cooperate.¹⁵⁶

In the context of interstate judging, this game may seem artificial, since judges do not, literally, cooperate. But they do informally and indirectly communicate through published case decisions,¹⁵⁷ which, viewed through the lens of *stare decisis*, are relatively reliable predictors of future behavior by that state. Eventually, game theory predicts that all fifty states will have a uniform rule,¹⁵⁸ a process that seems to be underway.

The upshot of game-theory analysis is that those few states that adhere to the old rule seem not to be driven exclusively, or even primarily, by interstate externality concerns. Thus, it is unnecessary to create federal common law to cover forum-selection clauses if such common law is primarily devoted to cleansing interstate litigation of spillovers that burden non-residents.

A final factor suggesting that the creation of federal common law is inappropriate is the Court's admonition that care should be taken when preempting areas of primary conduct traditionally regulated by the states.¹⁵⁹ Contract law is one of these areas,¹⁶⁰ and the writing of

return. Under the latter, there are no bilateral deals, but merely the general understanding in a group that cooperation can succeed. BRILMAYER, *supra* note 116, at 162. The reciprocity presented here is of the latter type.

155. Kramer, *supra* note 116, at 342-43. Compare Weinberg, *supra* note 153, at 56-57 (less sanguine about success of comity under these circumstances).

156. In effect, each state executes a *reciprocal* forum-selection clause with another state. For a rare example, see *Smith, Valentino & Smith, Inc. v. Superior Court*, 17 Cal. 3d 491, 131 Cal. Rptr. 374, 551 P.2d 1206 (1976) (California agent agreed to litigate in Pennsylvania, while the Pennsylvania principal agreed to litigate in California). See also Stern, *supra* note 7, at 20 (discussing possibility of such clauses).

157. BRILMAYER, *supra* note 116, at 159; G. ALAN TARR & MARY C. PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 30-34 (1988); Gregory A. Caldeira, *Legal Precedent: Structures of Communication Between State Supreme Courts*, 10 SOC. NETWORKS 29 (1988); Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178 (1985).

158. Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 1023-28 (1991).

Adoption of uniform acts by legislatures is often given as an example of cooperation. See BRILMAYER, *supra* note 116, at 161-62; Kramer, *supra* note 116, at 344. On the other hand, legislative uniformity does not necessarily indicate cooperation. For example, it has been argued that adoption of long-arm statutes, most of which extend to the limits of due process, see David S. Welkowitz, *Going to the Limits of Due Process: Myth, Mystery and Meaning*, 28 DUQUESNE L. REV. 233 (1990), is meant to make it easier for residents to sue out-of-state defendants. *Burnham v. Superior Court*, 110 S. Ct. 2105, 2125-26 n.14 (1990) (Brennan, J., concurring); Stein, *supra* note 83, at 2004. See also *United Rope Distrib., Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532, 535-36 (7th Cir. 1991) (Easterbrook, J.) (arguing for adoption of federal common law of personal jurisdiction in federal question cases).

159. See *supra* note 135 and accompanying text.

agreements containing forum-selection clauses falls easily within its domain. To the extent that party expectations are relevant, it would seem that most drafters of such clauses would think that state law would apply to govern the validity¹⁶¹ of the clause.¹⁶²

C. Developing and Applying Rules to Determine a Valid Waiver

Whether state or federal law governs the validity and interpretation of a forum-selection clause, the question of what standards should inform the judicial inquiry into whether a particular clause should be upheld remains.

1. *A Spectrum of Rules and the Relevance of Choice-of-Law Clauses*

The Bremen and *Carnival* appear to establish a general "reasonableness"¹⁶³ test to govern the enforcement of choice-of-forum clauses. As addressed above,¹⁶⁴ the reasonableness inquiry is based heavily on normal contractual principles. Courts are to determine whether the contract, or the clause contained therein,¹⁶⁵ was the product of undue influence or overwhelming bargaining power, and to consider whether the chosen forum was so seriously inconvenient that it, in effect, afforded no remedy at all. *Carnival* did not purport to modify this approach. Rather, it "refined" the analysis to take into account "the

160. *E.g.*, *Miree v. DeKalb County*, 433 U.S. 25 (1977) (third-party beneficiary action upon a federal contract); *United States v. Kimbell Foods*, 440 U.S. 715 (1979) (federal liens not directly involving federal interests).

161. Even if it were concluded that federal common law should govern the validity or enforceability of such clauses, it might be argued as a compromise that state law could govern the *interpretation* of the clause. *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 374 (7th Cir. 1990) (raising this as a possibility but not resolving issue). *Cf. Allen v. Alabama State Bd. of Educ.*, 816 F.2d 575 (11th Cir. 1987) (federal law governs validity, but state law governs authority to enter into settlement); *Morgan v. South Bend Cmty. Sch. Corp.*, 797 F.2d 471 (7th Cir. 1986) (same). The attractiveness of this position is that the per se validity (or lack thereof) of such clauses is the aspect most deserving of federal interest. The drawback to the argument is that, unless one body of law governs all of these issues, confusion and uncertainty will follow. It seems preferable to reject this bifurcated approach. *See Solimine, supra* note 122, at 330 (making similar argument with respect to law governing settlement of federal civil rights actions). *See also BORN & WESTIN, supra* note 5, at 173-76 (summarizing typical issues of interpretation).

162. Permitting state law to govern choice-of-forum clauses has the additional advantage of maintaining symmetry with the law governing choice-of-law clauses, typically state law. *E.g.*, *Freer, supra* note 83, at 1135 & n.226; *Stein, supra* note 83, at 1982 & n.223. For the reasons outlined above, there seems little justification for creating a federal common law to govern choice-of-law clauses.

163. This is how *Carnival* characterized the analysis in *The Bremen*. 111 S. Ct. at 1526.

164. *Supra* Part I.A.

165. Courts do not always make the distinction, but apparently the Court meant that the inclusion of the clause itself, not the contract as a whole, should be the subject of scrutiny. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974); *Moses v. Business Card Express, Inc.*, 929 F.2d 1131, 1138 (6th Cir.), *cert. denied*, 112 S. Ct. 81 (1991).

realities of form passage contracts.”¹⁶⁶ It did not claim to add or detract elements from *The Bremen* test. Indeed, *Carnival* seems to lay to rest the notion that *The Bremen* authorized a free-wheeling balancing-of-interests test to govern the enforceability of choice-of-forum clauses.¹⁶⁷

Nonetheless, *Carnival* leaves unanswered two significant issues left open by *The Bremen*. A doctrinal question remains concerning the relevance, if any, of a choice-of-law clause to determining the validity of a forum-selection clause. A normative question is whether the contractual basis of the waiver of rights permitted in *Carnival* and *The Bremen* is an adequate standard.

Apparently, many forum-selection clauses are routinely coupled with choice-of-law clauses, usually selecting the law of the chosen forum.¹⁶⁸ Such clauses raise two issues: (1) should the law chosen govern the validity of the forum-selection clause?¹⁶⁹ and (2) should the law chosen be a relevant factor in determining the validity of the clause? The first issue seems fairly easy to resolve. Most authorities hold that parties cannot choose the law with respect to certain matters outside their control, such as capacity, formalities or validity.¹⁷⁰ Thus, a contractual provision stating “there is consideration,” or directing a choice of law to that issue, is unenforceable. It seems to follow that the issue of the validity of a choice-of-forum clause is to be determined by forum law, notwithstanding the law referred to in a choice-of-law clause.¹⁷¹

166. *Carnival*, 111 S. Ct. at 1527.

167. For an excellent review of the post-*Bremen* lower court cases which address the validity of such clauses, see Mullenix, *supra* note 25, at 356-60. As Mullenix observes, *id.* at 357, the “expansion of *The Bremen* elements reached its apotheosis” in *D’Antuono v. CCH Computax Sys.*, 570 F. Supp. 708 (D.R.I. 1983), which held the following factors (among others) to be relevant:

- (1) The identity of the law which governs construction of the contract.
- (2) The place of execution of the contract(s).
- (3) The place where the transactions have been or are to be performed.
- (4) The availability of remedies in the designated forum.
- (5) The public policy of the initial forum state.
- (6) The location of the parties, the convenience of prospective witnesses, and the accessibility of evidence.
- (7) The relative bargaining power of the parties and the circumstances surrounding their dealings.
- (8) The presence or absence of fraud, undue influence or other extenuating (or exacerbating) circumstances.
- (9) The conduct of the parties.

Mullenix, *supra* note 25, at 358 (footnotes omitted) (quoting factors listed in *D’Antuono*, 570 F. Supp. at 712). Only factors (5), (6) and (7) and part of (8) seem to be drawn from *The Bremen* opinion.

168. SEDLER, *supra* note 7, at 71-72; Gruson, *supra* note 10, at 191 n.241; Freer, *supra* note 83, at 1135.

169. See Mullenix, *supra* note 25, at 300-01, 348-50 (raising issue and noting lack of resolution in lower courts).

170. WEINTRAUB, *supra* note 87, at 371-74; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1)-(2) & cmts. c & d (1988).

171. See, e.g., *Bense v. Interstate Battery Sys. of Am., Inc.*, 683 F.2d 718, 722 (2d Cir. 1982). Cf. *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 476

The second issue—the relevance of a choice-of-law clause to the reasonableness inquiry—is more complex. Two schools of thought appear to have emerged. Under one view, the law chosen is relevant to the inquiry. If the law chosen differs substantially from the law of the forum state asked to enforce the clause in derogation, then that is a factor suggesting unreasonableness.¹⁷² The other view disengages the two clauses and finds the law chosen irrelevant to the validity of a choice-of-forum clause.¹⁷³

The latter view seems preferable. It appears permissible for the parties to contract out of the protection of forum law by referring to the law of another state. This exercise of party autonomy is subject to a number of strictures, including that there be adequate consent and that the chosen state have some reasonable relationship to the parties or their dispute.¹⁷⁴ Regardless of whether those conditions are satisfied, however, it seems unnecessary to consider the choice-of-law clause in determining the validity of the forum-selection clause. To be sure, the chosen state's law (if the clause is enforced) may evade the law of the initial forum. But with adequate consent, the parties can decide to disclaim the protection or burden of forum law, the typical result when parties settle out of court.¹⁷⁵ And settlement is not forbidden for that reason. Put another way, a change of forum should operate regardless of whether the substantive law also changes by a choice-of-law clause or (in its absence) by a normal conflict-of-laws principle. Any other course would probably mean that forum-selection clauses would be enforced less often.¹⁷⁶ In addition, under the view advocated here the forum state's (the state that will give up jurisdiction) interest (if it has one) can be accommodated by determining that the chosen forum offers an adequate remedy.

This brings us to the normative issue raised by *The Bremen* and *Carnival*—whether contractual consent adequately considers the rights waived by a forum-selection clause. Forum-selection clauses typically waive rights to forum shop and to contest personal jurisdiction. It can be argued that waiver of these important rights, derived from constitutional due-process sources, should not be governed by normal contrac-

(1989) (parties, through choice-of-law clause in arbitration agreement, can direct that state law, rather than Federal Arbitration Act, applies).

172. *E.g.*, Gilbert, *supra* note 5, at 56. This appears to be the majority approach. Mullenix, *supra* note 25, at 350-51. *Cf. The Bremen*, 407 U.S. at 15. *See also* Lederman, *supra* note 5, at 462-64 (discussing when law designated in a choice-of-law clause should govern enforceability of forum-selection clause).

173. *E.g.*, Gruson, *supra* note 10, at 190-91.

174. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1)-(2) (1988); Kramer, *supra* note 116, at 329-30.

175. BRILMAYER & MARTIN, *supra* note 20, at 529; DAVID H. VERNON ET AL., CONFLICT OF LAWS 197-98 (1990).

176. *Cf. Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250 (1981) (giving same reason for why change in law should not be given great weight in forum non conveniens determination).

tual rules.¹⁷⁷ Pursuant to this argument, waiver, although permissible, should only be predicated on the waiving party's explicit recognition of the rights she is waiving. Such an inquiry would be informed by due-process principles rather than contractual ones.¹⁷⁸ Only some sort of judicial hearing, or at least heightened judicial scrutiny of the choice-of-forum clause, would appear to satisfy this standard.

The fear underlying this position seems to arise from the empirically correct observation that choice-of-forum clauses are seldom set aside under the usual principles of contract law.¹⁷⁹ This fear will undoubtedly be exacerbated by the outcome of *Carnival*. And there is ample precedent for a higher degree of judicial scrutiny of waivers of rights in certain situations.¹⁸⁰ It does not follow from these factors, however, that a higher standard of scrutiny is necessary to evaluate forum-selection clauses.

First, as the advocates of a standard of greater scrutiny acknowledge,¹⁸¹ the scope of necessary consent to a choice-of-forum clause depends on the nature of the right waived and the protections encompassed by the right. Some rights are more important than others and are therefore more deserving of a higher waiver standard. This accounts for the higher standards demanded for waiver of rights in criminal proceedings, where life and liberty are at stake. In contrast, in many civil proceedings, particularly those involving contractual disputes where the parties have structured their own relationships, standards drawn from contract law seem to be a natural source for the content of waiver.¹⁸²

While important, the rights waived by most forum-selection clauses do not demand a higher degree of perfection than that already provided

177. Here I summarize the argument made by Mullenix, *supra* note 25, at 364-72.

178. *Id.* at 369, 372. This analysis can be linked to the debate between autonomy-based notions of contract and fairness- or communitarian-based models. The latter model, like that posited in the text, would more heavily emphasize disparities in wealth and knowledge between the parties, the social context and evolving nature of their relationship, and the possibility of establishing certain inalienable rights. See Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 712-22 (1990).

179. Mullenix, *supra* note 25, at 362. See also BORN & WESTIN, *supra* note 5, at 195 ("Although unequal bargaining power is frequently argued, few courts have actually found the exception applicable.") (citations omitted).

180. See, e.g., FED. R. CIV. P. 23(e) (requiring court approval of settlements of class actions); Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 983 (1990) (codified in part at 29 U.S.C. § 626(f) (West Supp. 1991)) (requiring that, to be valid, waivers of rights under the Age Discrimination in Employment Act must, *inter alia*, specifically refer to rights waived, advise the individual waiving any right to consult an attorney, and be written in a manner calculated to be understood); Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 86 (giving other examples). See also O'Shea v. Commercial Credit Corp., 930 F.2d 358, 361-62 (4th Cir.), *cert. denied*, 112 S. Ct. 177 (1991) (noting two approaches courts, applying federal law, have applied to test the validity of waivers of federal rights: a "totality of the circumstances" test vs. ordinary principles of contract law).

181. Mullenix, *supra* note 25, at 371-72.

182. Rubin, *supra* note 95, at 512.

by contract law. As indicated above,¹⁸³ the rights involved, personal jurisdiction protections and the ability to forum shop, are largely personal rights with relatively few structural attributes. While those rights affect one's ability to pursue litigation, a cause of action is a property interest,¹⁸⁴ of somewhat less importance than the interests at stake in criminal proceedings. A valid forum-selection clause should send a litigant to another forum, not obliterate the right to sue entirely.¹⁸⁵ Moreover, the substantive law governing the merits of the dispute is ultimately more important than the place of litigation.¹⁸⁶

The second reason a higher standard of review is unnecessary is that current doctrine seems adequate to the task. That doctrine, as reflected in *The Bremen* and *Carnival*, draws largely on contractual principles, which are appropriate given that choice-of-forum clauses, by definition, arise out of a contract. Contract law does not treat such clauses exactly as it does any other contractual provision. Doctrines such as fraud and unconscionability, if used "flexibly, realistically,"¹⁸⁷ can prevent improper waiver of rights affected by such clauses. Moreover, current doctrine also focuses on whether the forum chosen is seriously inconvenient for the parties, a consideration that is invoked particularly if the chosen forum is foreign.¹⁸⁸

In short, current doctrine can adequately police waivers of rights by forum-selection clauses. This Article considers next whether that doctrine has in fact adequately operated in practice.

2. *Reconsidering A Typology of Forum-Selection Clauses*

A defender of current doctrine should reflect on how it has been applied in actual litigation. This Article does not offer an empirical study but focuses on three sets of cases that appear prominently in case law on forum-selection clauses. They will be discussed in increasing order of the difficulty they present for defenders of choice-of-forum clauses: (1) clauses negotiated between two commercial enterprises; (2) clauses in contracts between sophisticated individuals and companies; (3) clauses contained in form contracts, between individuals and companies.

183. *Supra* Part II.A.

184. *See* *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-33 (1982).

185. Rubin, *supra* note 95, at 558-59.

186. VERNON ET AL., *supra* note 175, at 176; Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 776-77 (1988); Linda Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978). *Cf.* Mullenix, *supra* note 25, at 372 (arguing that choice-of-law clauses should be subject to greater scrutiny as well); Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249, 266-67 (1991) (arguing that forum choice is as important as choice of law).

187. *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 377 (7th Cir. 1990) (Posner, J.). *See also* Solimine, *supra* note 122, at 329.

188. *See* BORN & WESTIN, *supra* note 5, at 198-99.

The first set of cases is exemplified by *The Bremen*, where the language of the choice-of-forum clause was the subject of negotiation between two large companies.¹⁸⁹ Presumably, these parties can and do consider the probability and costs of a dispute arising and the benefits, or lack thereof, of pre-designating a forum. They are not able to argue convincingly that the chosen forum is seriously inconvenient. For these reasons, most choice-of-forum clauses in contracts between such parties are enforced.¹⁹⁰

The second set of cases is slightly more troublesome. These cases involve dealings between educated and experienced individuals and corporations. For example, in *Northwestern National Insurance Co. v. Donovan*,¹⁹¹ a clause designating Wisconsin (the location of the company) as the forum¹⁹² was enforced over the protests of the individual defendants, who were millionaires from Texas.¹⁹³ Observing (consistent with *Carnival*, decided a few months later) that mere inequality of bargaining power does not invalidate the clause,¹⁹⁴ Judge Richard Posner pointed out that the defendants were "wealthy tax-shelter investors" who had incentives to read contractual papers (including, but of course not limited to, a choice-of-forum clause) that might subject them to great liability in case a certain loan defaulted.¹⁹⁵ For similar reasons, most such sophisticated individuals do not succeed in arguing against enforcing choice-of-forum clauses.¹⁹⁶

In *Northwestern*, Judge Posner acknowledged a "tension" between his approach and the Ninth Circuit opinion in *Shute v. Carnival Cruise Lines*, but distinguished the latter because the "facts . . . were special."¹⁹⁷ The clause in that case, he noted, was contained in a classic form contract, which the Shutes did not even receive until the transaction was complete. "Perhaps no stretch" of the concepts of fraud and unconscionability "was necessary," he mused, to justify the result of the

189. See *The Bremen*, 407 U.S. at 2-3 (describing contractual process).

190. E.g., *Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762 (9th Cir. 1989); *Paul Business Sys., Inc. v. Canon U.S.A., Inc.*, 397 S.E.2d 804 (Va. 1990); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351 (9th Cir. 1990). But see *Weidner Communications, Inc. v. H.R.H. Prince Bandar al Faisal*, 859 F.2d 1302 (7th Cir. 1988) (not enforced due to unequal bargaining power between parties).

191. 916 F.2d 372 (7th Cir. 1990).

192. *Id.* at 374-75.

193. *Id.* at 374.

194. *Id.* at 377.

195. *Id.* at 378.

196. E.g., *Spradlin v. Lear Siegler Mgt. Serv. Co., Inc.*, 926 F.2d 865 (9th Cir. 1991) (employment agreement); *Jones v. Weibrecht*, 901 F.2d 17 (2d Cir. 1990) (*per curiam*) (sale of stock agreement); *Appell v. George Philip and Son, Ltd.*, 760 F. Supp. 167 (D. Nev. 1991); *Scheck v. Burger King Corp.*, 756 F. Supp. 543 (S.D. Fla. 1991). See also *Freeze v. American Home Prod. Corp.*, 839 F.2d 415 (8th Cir. 1988) (enforcing choice-of-law clause).

197. *Northwestern*, 916 F.2d at 376-77.

Ninth Circuit.¹⁹⁸

The facts of *Carnival* present the most difficult scenario in which to justify choice-of-forum clauses. The clause was contained in a standard form contract with no mention of, much less bargaining over, the content of the clause. Moreover, nothing in the published opinions reveals that the Shutes were sophisticated individuals who had incentives to read or ask about such clauses, or who could easily litigate their claims in Florida.

Nonetheless, the result reached was correct. The majority in *Carnival* argued that the forum-selection clause was reasonable, despite the lack of bargaining. It observed that such clauses contained in standard form contracts confer ex ante benefits to the litigants by providing certainty as to jurisdictional issues, and by conferring savings (spread out among all such contracts) realized by the cruise line in limiting the places where it can be sued.¹⁹⁹ These observations fit comfortably into the considerable literature that analyzes and generally supports form contracts. Form contracts reduce transaction costs²⁰⁰ and do not prevent bargaining over other matters, such as price.²⁰¹ Moreover, parties like the Shutes are not completely without bargaining leverage. For example, numerous cruise passengers, assuming they were ex post offended by the forum-selection clause, conceivably could publicize the

198. *Id.* Amusingly, in their briefing before the Supreme Court, attorneys for Carnival embraced Judge Posner's opinion in *Northwestern*, given his favorable comments about forum-selection clauses contained in form contracts, *id.* at 377, but held at arm's length his comment about their case, which they claimed "was made without any analysis" of cases involving cruise tickets. See Reply Brief for the Petitioner at 10 n.7, *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991) [hereinafter Reply Brief]. The Court itself did not specifically focus on that case in reaching its decision. See *supra* note 44.

199. 111 S. Ct. at 1527. Presumably, price elasticity studies in the relevant market served might confirm or deny the Court's speculation on the latter point.

Likewise, such a calculus may not account for all of the costs. If Carnival did cause personal injuries, and if a forum-selection clause prevents litigation, then uncompensated real costs (to the injured party) and social costs (to third parties) are realized but go uncompensated. In these circumstances, we might ask which party is the cheaper cost avoider. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 274-84 (1987). Undoubtedly, it would be Carnival. If so, perhaps we should not enforce forum-selection clauses, or at least presume against their enforcement in *Carnival*-like (as opposed to *The Bremen*-like) circumstances. Such an analysis emphasizes the importance of deciding whether such clauses, in a given instance, would indeed as a practical matter prevent litigation. See *infra* notes 207-10 and accompanying text.

200. POSNER, *supra* note 111, at 102; 1 FARNSWORTH, *supra* note 12, at 480.

201. Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 273 (1990).

It is also worth noting that some writers argue that Americans are, in any case, averse to the type of bargaining demanded by critics of form contracts. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 871 (1991); *Northwestern Nat'l Ins. Co.*, 916 F.2d at 377. See also Jay Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1306-08 (1990).

matter and bring pressure to bear on the cruise lines.²⁰²

Even if a general attack on standard form forum-selection clauses does not succeed, individuals like the Shutes could still fall back on doctrines such as unconscionability or fraud. For example, the couple received the tickets containing the clause in the mail, after finalizing the transaction, but before boarding the vessel.²⁰³ Had they been unable to rescind after first having the opportunity to view the clause, then, arguably, the clause could be considered invalid.²⁰⁴ Likewise, if they did not have the tickets until they boarded the ship, then enforcement of the clause would seem unreasonable.²⁰⁵ In these situations, apparently not presented in *Carnival*, it could be argued that the contract was not properly communicated to a party or that it contained a term that a reasonable person might not expect it to contain.²⁰⁶ It would be different if the consumers had signed or at least seen these documents at the time of contracting.

The second part of the reasonableness inquiry in *Carnival* considered and rejected the Shutes' argument that Florida was a seriously inconvenient forum.²⁰⁷ This result is also correct. As the Court observed, no evidence in the record demonstrated that the plaintiffs or their potential witnesses would be inconvenienced, or that Florida courts would be a hostile forum.²⁰⁸ While individual litigants could attempt to show inconvenience factually, it would be very difficult to succeed, since presumably parties or their local counsel could retain Florida attorneys to take the case.²⁰⁹ The incremental additional cost of litigating in Florida, as opposed to Washington, does not seem by itself

202. See David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 404-05 (1990) (consumers collectively and over time can impose a reputational sanction against a standard form contract); Katz, *supra* note 201, at 280-81. To be sure, this sort of sanction will only benefit a future class of consumers, of whom people like the Shutes may not be members—unless they travel on cruises on a regular basis.

203. *Carnival*, 111 S. Ct. at 1524.

204. The majority in *Carnival* briefly mentioned this factor. *Id.* at 1528. Counsel for the parties debated the point. Compare Brief for Respondents at 28, *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991) (arguing ticket contract provided no refund for an unused ticket) with Reply Brief, *supra* note 198, at 9 n.6 (acknowledging that "ticket contract forbids refunds for unused tickets after a cruise, but the brochure provided to prospective passengers makes clear that refunds are available to passengers who cancel a reasonable period before the cruise . . . The Shutes received the brochure.").

205. This was the situation presented with regard to several of the plaintiffs involved in *Carnival Cruise Lines, Inc. v. Superior Court*, 272 Cal. Rptr. 515, 518 (1990), *cert. granted*, 111 S. Ct. 1614 (1991) (remanded for further consideration in light of *Carnival*).

206. Cf. 1 FARNSWORTH, *supra* note 12, at 483 (discussing contractual terms not part of offer as grounds for invalidation).

207. 111 S. Ct. at 1527-28.

208. *Id.* at 1528.

209. Presumably organizations like the Association of American Trial Attorneys could facilitate such communication. See also *Reid-Walen v. Hansen*, 933 F.2d 1390, 1398-99 (8th Cir. 1991) (forum non conveniens case, noting importance of plaintiff's ability to litigate in a foreign forum).

enough to be deemed seriously inconvenient.²¹⁰

III. The Future of Forum-Selection Clauses

The post-*Carnival* era will likely see more forum-selection clauses inserted into contracts, and more, although not necessarily all, of those clauses enforced. Nevertheless, at least three obstacles to this benign view may render the post-*Carnival* climate less hospitable than it might at first seem: (1) possible preemption by federal or state statutes, (2) the effect of transfer or dismissal statutes or doctrines on the operation of forum election clauses, and (3) the effect of the designated forum being outside the United States.

A. Statutory Preemption

1. Federal Statutes

Without question, Congress has the constitutional authority to enact statutes limiting the validity of forum-selection clauses.²¹¹ The problem lies in determining whether Congress, in any particular statute, has done so. Ordinary tools of statutory construction provide a useful starting point²¹² but deciding what the ordinary tools *are* is a matter of some dispute in the Court. The recent trend has been to focus on the text of the relevant statutory provision,²¹³ but other cases include additional factors to be considered, such as the entire statutory scheme,²¹⁴ the statute's legislative history,²¹⁵ and the underlying purpose of the statute.

210. See Brilmayer et al., *supra* note 186, at 776; Perdue, *supra* note 108, at 554.

211. With regard to proceedings in federal court, Congress can rely on its "powers under Article III as augmented by the Necessary and Proper Clause." *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988) (citation omitted). With regard to proceedings in state court, Congress could presumably rely on the Commerce Clause. It is doubtful that the Tenth Amendment would prove to be much of a barrier to the exercise of the latter power. Cf. Stein, *supra* note 83, at 1943-44.

212. Congressional regulation of forum-selection clauses does not seem to be an appropriate place to fashion any clear-statement rules, e.g., a canon of construction requiring that Congress textually and explicitly state that forum-selection clauses are the subject of the law. Such clear-statement rules should be supported by important constitutional or public policy objectives. See *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 111 S. Ct. 2166, 2170 (1991). While, post-*Carnival*, there can be said to be a federal policy favoring the enforcement of choice-of-forum clauses, that objective arguably conflicts with the concurrent policy of providing liberal remedies to plaintiffs enforcing federal rights. See *supra* notes 137-39 and accompanying text. In light of this clash of interests, there is little firm basis for establishing an uncontroversial or coherent clear-statement rule in this context.

213. E.g., *West Virginia Univ. Hosp., Inc. v. Casey*, 111 S. Ct. 1138, 1143 (1991). See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231.

214. E.g., *International Primate Protection League v. Tulane Educ. Fund*, 111 S. Ct. 1700, 1705 (1991).

215. E.g., *Farrey v. Sanderfoot*, 111 S. Ct. 1825, 1829 (1991).

Last Term, for example, the Court considered a waiver-of-remedies case pertinent to the issue at hand. In *Gilmer v. Interstate/Johnson Lane Corp.*²¹⁶ the Court considered the argument that the Age Discrimination in Employment Act rendered invalid an employment agreement that contained a compulsory arbitration provision for ADEA-related claims. To determine whether Congress intended to "preclude a waiver of judicial remedies" for ADEA rights, the Court examined the "text of the ADEA, its legislative history [and whether there was an] 'inherent conflict' between arbitration and the ADEA's underlying purposes."²¹⁷ Using that test, the Court permitted the arbitration agreement to stand—a result consistent with the "'federal policy favoring arbitration.'" ²¹⁸

As noted above, the Court in *Carnival* similarly rejected the argument that the Limited Liability Act,²¹⁹ which invalidates contractual clauses that "lessen" or "weaken" ship passengers' rights to sue, affected forum-selection clauses. The Court observed that the plain language of the provision did not mention such clauses, and that the legislative history instead seemed to outlaw provisions that "limit the shipowner's liability for negligence or . . . remove the issue of liability from the scrutiny of any court" via an arbitration clause.²²⁰ Nevertheless, the dissent noted that the lack of mention of choice-of-forum clauses was not surprising given the general rule in effect when the Act was passed, denying enforcement to such clauses.²²¹ Moreover, the dissent argued such clauses do "lessen" or "weaken" the Shutes' ability to recover by denying them what they consider to be a favorable forum.²²² Thus, the dissent concluded, a "liberal reading" of the Act would cover forum-selection clauses.²²³

The Limited Liability Act would seem to be an ideal candidate for the "liberal reading" favored by the *Carnival* dissent. Neither the text nor the legislative history of the Act (passed over 50 years ago) mention forum-selection clauses. This arguably gives interpreters somewhat greater leeway in construing the provisions to meet modern needs.²²⁴ Moreover, the Act does not seem to favor one small interest group at the expense of the public (indeed, it seems to do the opposite), further

216. 111 S. Ct. 1647 (1991).

217. *Id.* at 1652 (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987)).

218. *Id.* (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

219. 46 U.S.C. app. § 183c (1988).

220. *Carnival*, 111 S. Ct. at 1528-29.

221. *Id.* at 1532 (Stevens, J., dissenting).

222. *Id.*

223. *Id.* The dissent also pointed out that analogous provisions of the Carriage of Goods by Sea Act, 46 U.S.C. app. §§ 1300-56 (1988), have been interpreted to make such clauses void. 111 S. Ct. at 1532-33. See also Mullenix, *supra* note 25, at 345 n.282.

224. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

support for a broad reading of the statute.²²⁵

However, the majority opinion relied upon the text and legislative history of the statute, and gave little if any attention to the "underlying purposes" of the Act, one of the criteria mentioned in *Gilmer*.²²⁶ This result reflects the reasoning of most of the Court's statutory jurisprudence.²²⁷ Perhaps the Court is less willing broadly to interpret statutes dealing with procedural or jurisdictional matters because such statutes are often narrowly drawn.²²⁸ Or perhaps the Court *was* sub silentio invoking a presumption in favor of forum-selection clauses.

The Limited Liability Act is almost unique in that it speaks to the protection of a potential plaintiff. Most federal jurisdictional or procedural statutes speak only indirectly in that regard. For example, most statutes creating private causes of action simply generalize about where suit may be brought.²²⁹ It is doubtful that the mere existence of a private cause of action, in itself, limits the operation of a choice-of-forum clause.²³⁰ But what if a statute vests *exclusive* jurisdiction in the federal courts?²³¹ Typically, the purpose of such exclusivity is to encourage uniform application of law in one court system and to combat possible bias or lack of expertise by state courts.²³² It seems reasonable to interpret such statutes as limiting enforcement of forum-selection clauses to those that designate some *federal* court. Most courts have followed this

225. In public-choice parlance, while the Act may have been the result (in part) of pressure from rent-seeking interest groups, the benefits are distributed among many ship passengers while the detriments are concentrated within the shipping industry. See William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 290 (1988). In such circumstances, a court is arguably justified in "updating" the statute to reflect modern problems and needs. *Id.* at 299. But see Einer R. Elhauge, *Does Interest Group Theory Justify More Intensive Judicial Review?*, 101 YALE L.J. 31, 60 n.125 (1991) (questioning Eskridge on this point).

226. See *supra* notes 216-17 and accompanying text. Perhaps it is no coincidence that Justices Stevens and Marshall dissented in *Gilmer*, as well. 111 S. Ct. at 1657-61 (Stevens & Marshall, JJ., dissenting).

227. See generally Eskridge, *supra* note 213; William N. Eskridge, Jr., & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

228. William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1085 (1989); Daniel A. Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 2, 16-17 (1988).

229. *E.g.*, 15 U.S.C. §§ 15(a), 22 (1988) (antitrust laws); 42 U.S.C. § 2000e-2000e-17 (1988) (Title VII of 1964 Civil Rights Act). Some statutes do not even mention jurisdiction or venue, *e.g.*, 42 U.S.C. § 1983 (1988), and one must fall back on the general jurisdictional, *e.g.*, 28 U.S.C. §§ 1331 & 1343 (1988), or venue statutes, *e.g.*, 28 U.S.C.A. § 1391 (West Supp. 1991).

230. See *supra* note 136 and accompanying text.

231. *E.g.*, 28 U.S.C. § 1338(a) (1988) (patent and copyright actions); 15 U.S.C. § 78aa (1988) (Securities Exchange Act of 1934). See also Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. PITT. L. REV. 383, 386-88 (1991) (giving other examples).

232. *Tafflin v. Levitt*, 493 U.S. 455, 464-65 (1990). See generally Solimine, *supra* note 231, at 406-13 (critique of traditional reasons for exclusivity). Cf. Stein, *supra* note 83, at 1967 n.161 (addressing exclusive jurisdiction in *Erie* context).

position,²³³ although it was passed over in *Carnival*.²³⁴

Another possible source of federal limitation on forum-selection clauses are venue statutes. The case often cited²³⁵ for this proposition is *Boyd v. Grand Trunk Western Ry. Co.*²³⁶ There, plaintiff brought suit under the Federal Employers Liability Act (FELA)²³⁷ in a forum different from that stipulated in an agreement he had executed with his employer. The forum was, however, consistent with the venue prerogatives found in the FELA.²³⁸ The Court held the forum-selection clause void under an FELA provision that invalidated "any contract" that "enable[s] any common carrier to exempt itself from any liability created by this Act"²³⁹ The Court held that the liberal venue provisions of the FELA, which permitted suit in either federal or state court and prohibited removal amounted to a "substantial right" that could not be waived.²⁴⁰

Although one might read *Boyd* to stand for the broad proposition that venue guidelines cannot be waived or, at the least, that choice-of-forum clauses must mirror statutory venue options,²⁴¹ such a broad reading seems incorrect. First, unlike many federal laws, the FELA contains an anti-waiver provision. This suggests that Congress intended to grant special protection to FELA plaintiffs. Thus, venue statutes without anti-waiver provisions may be waived via an otherwise valid forum-selection clause.²⁴² Second, the *Boyd* analysis seems to be in some tension with *Carnival*. In *Carnival*, the Limited Liability Act also contained an anti-waiver provision, yet the Court held that since it did not mention forum-selection clauses it did not invalidate such clauses. Similarly, it might be reasoned that the FELA's anti-waiver provision makes no mention of such clauses, and such clauses do not remove "liability" but merely channel litigation into a forum different from that permitted by the FELA's venue rules. Perhaps the two cases can be reconciled by the

233. *E.g.*, *Bense v. Interstate Battery Sys. of Am., Inc.*, 683 F.2d 718, 720 (2d Cir. 1982) (antitrust action, forum-selection clause designating "Dallas County, Texas" as forum is stated to be federal district court which embraces Dallas County). *See also* Stein, *supra* note 83, at 2005-06.

234. *Carnival* fell under admiralty jurisdiction, which lies in the exclusive purview of federal courts. 28 U.S.C. § 1333(1) (1988). Nevertheless, the Court enforced without comment a choice-of-forum clause that designated "a Court located in the State of Florida, U.S.A." *See supra* note 38 for complete text of the clause.

235. *E.g.*, *Gilbert*, *supra* note 5, at 42 n.230.

236. 338 U.S. 263 (1949) (per curiam).

237. 45 U.S.C. §§ 51-56 (1988).

238. 45 U.S.C. § 56. *See Boyd*, 338 U.S. at 265.

239. *Id.* (quoting 45 U.S.C. § 55).

240. 338 U.S. at 266.

241. *Gilbert*, *supra* note 5, at 40-42.

242. *See, e.g.*, *Bense v. Interstate Battery Sys. of Am., Inc.*, 683 F.2d 718, 720-22 (2d Cir. 1982) (venue provisions of antitrust laws can be waived in a forum-selection clause). *See also* *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (arbitration of securities claims permitted in spite of provision of Securities Act of 1933 permitting plaintiff to "sue in any court of competent jurisdiction." 15 U.S.C. § 771(2) (1988)).

strong policy of protecting unsophisticated workers which generally animates the FELA.²⁴³

A third potential conflict between choice-of-forum clauses and federal statutes has arisen in the context of the federal removal statute.²⁴⁴ A contract may designate a state court, or the court chosen by one party, as the *exclusive* forum. Does such a clause waive the right to remove the action to federal court? The case law does not forbid waiver, but requires varying degrees of consent by the party seeking removal.

The cases are split on the degree of consent needed for valid waiver of the right of removal. One line of authority is exemplified by *In re Delta America Re Insurance Co.*²⁴⁵ There, the Sixth Circuit held that when a foreign sovereign exercises the removal option provided by the Foreign Sovereign Immunities Act (FSIA),²⁴⁶ any waiver must be "clear and unequivocal."²⁴⁷ A clause designating the forum as "any court of competent jurisdiction within the United States" did not meet this standard.²⁴⁸ The court emphasized the special protection bestowed by Congress upon foreign defendants,²⁴⁹ although the Sixth Circuit applied the same standard in an earlier case not involving a foreign defendant.²⁵⁰

The Third Circuit opinion in *Foster v. Chesapeake Ins. Co., Ltd.*²⁵¹ illustrates the other position on removal. In *Foster*, the court held that a forum-selection clause, identical to the clause in *Delta*, did waive the right to remove.²⁵² *Foster* distinguished *Delta* on two bases: first, it said *Delta* "was primarily driven by considerations peculiar to the FSIA,"²⁵³ and second, it did not agree that waivers of the right to remove must be "clear and unequivocal."²⁵⁴ Rather, the court observed, removal stat-

243. See *Dice v. Akron, Canton & Youngstown Ry. Co.*, 342 U.S. 359, 362 (1952) (discussing purposes of FELA). But see *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1655 (1991) ("Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.")

244. 28 U.S.C.A. §§ 1446-47 (West Supp. 1991).

245. 900 F.2d 890 (6th Cir.), *cert. denied sub nom.* *Wright v. Arim Ins. Co.*, 111 S. Ct. 233 (1990).

246. 28 U.S.C. § 1441(d) (1988). This provision was enacted as part of the FSIA. Pub. L. 94-583, § 6, 90 Stat. 2898 (1976).

247. 900 F.2d at 892, 893.

248. *Id.*

249. *Id.* at 893-94. See also *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A.*, 760 F.2d 390, 397 (2d Cir. 1985) (choice of forum that simply puts jurisdiction in either a state or federal court does not waive right of removal).

250. *Regis Assoc. v. Rank Hotels (Management), Ltd.*, 894 F.2d 193, 195 (6th Cir. 1990). See also *Mullenix*, *supra* note 25, at 344-46 (supporting restrictions on waiver of removal statute).

251. 933 F.2d 1207 (3d Cir.), *cert. denied*, 112 S. Ct. 302 (1991).

252. *Id.* at 1216-17. See also *id.* at 1217 (citing several district court opinions holding the same).

253. *Id.* at 1217-18 n.15.

254. *Id.* at 1218 n.15.

utes have long been construed strictly against the right of removal.²⁵⁵ Moreover, given the presumptive enforceability of choice-of-forum clauses as emphasized by *The Bremen*, it was appropriate to use ordinary methods of contractual construction to interpret the clause.²⁵⁶

The Third Circuit has the better argument. Absent compelling considerations, such as a defendant governed by the FSIA, a choice-of-forum clause ought to be governed by ordinary rules of contract interpretation. The right to remove does not seem to possess the sort of structural characteristics that would make it non-waivable, putting aside the fact that the statute does not contain an "anti-waiver" provision. However, the Sixth Circuit approach is salutary insofar as it adjusts the level of consent necessary rather than taking the more drastic step of invalidating any contractual provision that purports to waive the right to remove.

2. State Statutes

The rise of forum-selection clauses has been almost wholly a common law phenomenon. What little legislative activity there has been does not seem to have been particularly significant. A Model Uniform Choice of Forum Act, promulgated in 1968,²⁵⁷ presented criteria for

255. See *Somlyo v. J. Lu-Rob Enterprises, Inc.*, 932 F.2d 1043, 1045-46 (2d Cir. 1991) ("In light of the congressional intent to restrict federal court jurisdiction, as well as the importance of preserving the independence of state governments, federal courts construe the removal statute narrowly, resolving any doubts against removability.").

256. *Foster*, 933 F.2d at 1218 n.15. See also *City of Rose v. Nutmeg Ins. Co.*, 931 F.2d 13, 15 (5th Cir.) (critical of reasoning in *Delta*), cert. denied sub nom. *Nutmeg Ins. Co. v. City of Rose*, 112 S. Ct. 301 (1991).

257. The Act is reprinted in Willis L. M. Reese, *The Model Choice of Forum Act*, 17 AM. J. COMP. L. 292, 292 (1969). It states, in part, as follows:

SECTION 2. [Action in This State by Agreement.]

(a) If the parties have agreed in writing that an action on a controversy may be brought in this state and the agreement provides the only basis for the exercise of jurisdiction, a court of this state will entertain the action if

- (1) the court has power under the law of this state to entertain the action;
- (2) this state is a reasonably convenient place for the trial of the action;
- (3) the agreement as to the place of the action was not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; and

- (4) the defendant, if within the state, was served as required by law of this state in the case of persons within the state or, if without the state, was served either personally or by registered [or certified] mail directed to his last known address.

(b) This section does not apply [to cognovit clauses] [to arbitration clauses or] to the appointment of an agent for the service of process pursuant to statute or court order.

...

SECTION 3. [Action in Another Place by Agreement.] If the parties have agreed in writing that an action shall on a controversy be brought only in another state and it is brought in a court of this state, the court will dismiss or stay the action, as appropriate, unless

- (1) the court is required by statute to entertain the action;

enforcement similar to that found in *The Bremen*,²⁵⁸ and was adopted by four states.²⁵⁹ One other state has enacted a statute that directs enforcement of such clauses in certain commercial matters.²⁶⁰ On the other side, two states have passed statutes that limit enforcement of such clauses in certain consumer matters,²⁶¹ and one state (Montana) has passed a law that has been interpreted by the courts of that state to void choice-of-forum clauses.²⁶²

Despite the apparent use and importance of forum-selection clauses, several reasons may explain why there has not been more legislative activity regarding such clauses. Historically, state legislatures have given remarkably little attention to conflict of laws matters when drafting legislation.²⁶³ Development in case law may have overtaken the need for such laws—especially as perceived by the local bar, who would

- (2) the plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action;
- (3) the other state would be a substantially less convenient place for the trial of the action than this state;
- (4) the agreement as to the place of the action was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; or
- (5) it would for some other reason be unfair or unreasonable to enforce the agreement.

258. *The Bremen* referred to the Model Act with approval. 407 U.S. 1, 11 n.13 (1972).

259. The four states are Illinois, Nebraska, New Hampshire, and North Dakota. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 951, 1020 (1974). The Act was withdrawn in 1975, due to its few adoptions. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 142 (1975).

260. N.Y. GEN. OBLIG. LAW § 5-1402 (Consol. Supp. 1990) (promulgated 1984). A very similar law was recently enacted in Ohio. Am. Sub. H.B. 221, 119th Ohio Gen. Assem. (1991) (to be codified at OHIO REV. CODE § 2307.39).

261. CAL. COM. CODE § 10106 (West Supp. 1991); OKLA. STAT. tit. 12A, § 2A-106 (1990). See also UNIFORM FRANCHISE AND BUSINESS OPPORTUNITIES ACT § 509, 7A U.L.A. 105 (1991 Supp.) (invalidating choice-of-forum clauses in franchise litigation), (promulgated 1977); Gruson, *supra* note 10, at 178-79 & n. 199 (giving examples of state franchise laws rendering forum-selection clauses invalid). But see *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc.*, 871 F.2d 734, 738-40 (8th Cir. 1989) (en banc) (enforcing choice-of-law clause which opted out of state franchise law which contained an anti-waiver provision); *Tele-Save Merchandising Co. v. Consumers Distributing Co.*, 814 F.2d 1120 (6th Cir. 1987) (same).

262. MONT. CODE ANN. § 28-2-708 (1990). The provision states as follows:

Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights is void. This section does not affect the validity of an agreement enforceable under Title 27, chapter 5 [referring to arbitration clauses].

In *State ex rel. Polaris Indus., Inc. v. District Court*, 695 P.2d 471 (Mont. 1985), the court interpreted this provision to invalidate a clause designating another state as the forum. This result surely does not inexorably follow, given the lack of mention of such clauses in the statute, as well as the reference to "the usual proceedings in the ordinary tribunals," which could refer to courts in other states. Contrast *Carnival's* interpretation of the Limited Liability Act.

263. Kramer, *supra* note 116, at 293.

likely benefit the most from the added business and would also be in a position to influence the legislature.²⁶⁴ Relatedly, legislators who are also lawyers may have been schooled in the old way of thinking about forum-selection clauses and may not be disposed to enact laws challenging the "ouster" theory. Perhaps it is surprising that there has not been a legislative response in the few states that do not enforce choice-of-forum clauses.

One potentially rich source of state interference with forum-selection clauses was suggested by the Florida Supreme Court in *C.R. McRae v. J.D./M.D., Inc.*²⁶⁵ There, the court, while generally upholding the validity of such clauses, nevertheless held that a forum-selection clause cannot be the sole basis for exercising jurisdiction over an objecting non-resident defendant.²⁶⁶ Rather, the defendant must also have committed acts that fall under the purview of the long-arm statute and thereby must have some minimum contacts with the forum state.²⁶⁷ The court observed that "[c]onspicuously absent from the long-arm statute is any provision for submission to in personam jurisdiction merely by contractual agreement."²⁶⁸

Such a provision seems to be similarly absent from every other state's long-arm statute. However, the Florida Supreme Court reached the incorrect result. Essentially, the court seems to disagree with the accepted view that a properly drafted forum-selection clause also waives any personal jurisdiction barriers.²⁶⁹ The court's position is difficult to reconcile with its professed solicitude toward forum-selection clauses. It also reads too much into a long-arm statute, which, as the court acknowledged, is silent on the matter. Perhaps the court was concerned that it would have to accept cases involving at least one party with no state contacts,²⁷⁰ and thus unlikely to implicate the regulatory interest of Florida. Such a concern, however, can be accommodated by accepting the case, but then considering a transfer to another state, or outright dismissal—the subject of the next section.

B. Transfer and Dismissal after Derogation and Prorogation

Most of the published case law concerns derogation—whether or not to abstain in the matter because a forum-selection clause designates another jurisdiction as the forum.²⁷¹ If the first court agrees to derogate, it may either dismiss the action or transfer it (if that route is available) to the designated forum. Similarly, when the second court

264. For an analogous discussion of the passage of corporate law, see Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987).

265. 511 So. 2d 540 (Fla. 1987).

266. *Id.* at 544.

267. *Id.* at 543.

268. *Id.*

269. See *supra* notes 97-99 and accompanying text.

270. The plaintiff in the case had contacts with Florida. 511 So. 2d at 543.

271. Gilbert, *supra* note 5, at 19.

receives the action in prorogation, it may wish, for a variety of reasons, to transfer it, or dismiss it on forum non conveniens grounds.

The principal route of transfer among federal courts is § 1404(a), considered in the *Stewart* case.²⁷² As the Court observed,²⁷³ the language and case law of § 1404(a) requires a case-by-case determination of whether another forum will be more convenient to the parties and to the witnesses.²⁷⁴ Section 1404(a) only permits transfer among federal district courts, and no authority currently permits transfer between federal and state courts, or between state courts.²⁷⁵ In those instances, the first state must dismiss and suit must be refiled in the second state.

Forum non conveniens is a common law doctrine permitting a court to dismiss an action in favor of another, more convenient forum. Typically, in determining the propriety of such a dismissal, a court will consider both "private" and "public" interests.²⁷⁶ Initially, the court should consider whether there is an alternative forum with an adequate remedy.²⁷⁷ If there is, then the court should consider private interests, including relative ease of access to sources of proof, ability to join other parties, and other practical problems.²⁷⁸ Matters of public interest for a court to consider include the merits of having a forum apply its own law, whether it would be unfair to burden a judge and jury in a forum with little connection to the controversy, and the interests of the respective fora in the outcome of the case.²⁷⁹

Arguably, a forum-selection clause waives the possibility of a § 1404(a) transfer or a forum non conveniens dismissal in the second state. Just as such a clause, when enforced, waives the defense of personal jurisdiction, it would seem to do the parties little good if, despite the clause, battle ensues on other grounds. This argument has not, however, been accepted in full. Case law permits the second state to consider a transfer or dismissal, at least on grounds other than incon-

272. *Supra* Part I.B. See also Freer, *supra* note 83, at 1128-29 (discussing 28 U.S.C. § 1406 (1988) as a method of transfer); Lederman, *supra* note 5, at 440-43 (same).

273. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29-31 (1988).

274. Among the factors courts consider are: "the forum actually chosen by the plaintiff, the current convenience of the parties and witnesses, the current location of pertinent books and records, similar litigation pending elsewhere, current docket conditions, and familiarity of the potential courts with governing state law." *Id.* at 34 (Scalia, J., dissenting). See generally David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443 (1990).

275. The latter type of transfer would be permissible under the Uniform Transfer of Litigation Act, adopted by the Conference of Commissioners on Uniform State Laws in August of 1991. UNIF. TRANSFER OF LITIGATION ACT, — U.L.A. — (1991). For further discussion of the Uniform Act, see Thomas D. Rowe, Jr., *Jurisdictional and Transfer Proposals for Complex Litigation*, 10 REV. LITIG. 325, 354-58 (1991).

276. *E.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1982). See generally Allan R. Stein, *Forum Non Conveniens and the Redundancy of the Court-Access Doctrine*, 133 U. PA. L. REV. 781 (1985).

277. *Piper*, 454 U.S. at 254 n.22.

278. *Id.* at 241 n.6.

279. *Id.*

venience to the moving party.²⁸⁰ This compromise is sound, for only private interests should be waivable by a choice-of-forum clause. Factors other than convenience to the parties affect other individuals as well as the court itself, and they thus involve the sort of structural interests that usually should not be waivable.²⁸¹

The *Stewart* decision, however, threw into some doubt the relevance of a forum-selection clause to § 1404(a) analysis. Recall that the Court held that the presence of such a clause was just one factor among several to consider. Most courts seem to follow the *Stewart* mandate faithfully, giving such clauses tie-breaking weight when addressing motions seeking § 1404(a) transfers.²⁸²

Other courts, however, seem unwilling to give choice-of-forum clauses even the moderate weight required by *Stewart*. In *Red Bull Assoc. v. Best Western Int'l, Inc.*,²⁸³ for example, Best Western decided to terminate its relationship with the Red Bull Motel. Red Bull brought suit in federal court in New York, its place of business, alleging federal civil rights violations. Best Western moved to transfer to Arizona under § 1404(a), citing a forum-selection clause designating that state, Best Western's place of business, as the exclusive forum.²⁸⁴ The Second Circuit upheld a denial of transfer, relying on the apparent inability or unwillingness of Red Bull to pursue litigation in Arizona,²⁸⁵ as well as the imperative of encouraging private enforcement of the civil rights laws.²⁸⁶

The reasoning of *Red Bull* is unsound. It seems to gut the operation of forum-selection clauses in virtually any federal question case providing for a private cause of action. Red Bull could still file a federal action in Arizona because, as the district court acknowledged, the inconvenience to Red Bull could not cut in its favor.²⁸⁷ The only practical benefit identified was Red Bull's desire to obtain a local jury in New York.²⁸⁸ This desire is understandable, but it should not be enough to defeat the enforcement of the clause, absent the showing of other factors relevant to a § 1404(a) motion.

280. See *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 378 (7th Cir. 1990) (discussion of § 1404(a)). Cf. *Cutler*, *supra* note 4, at 111 (stating, without elaboration, that forum non conveniens defense is still available in the second state).

281. *Supra* Part II.A.

282. E.g., *Brock v. Entre Computer Centers, Inc.*, 933 F.2d 1253, 1258 (4th Cir. 1991). See also *Steinberg*, *supra* note 274, at 518 (giving other examples); UNIF. TRANSFER OF LITIGATION ACT, *supra* note 275, at § 104 commentary (stating that forum-selection clause is one of several criteria to consider).

283. 862 F.2d 963 (2d Cir. 1988). For other cases with results similar to *Red Bull*, see *BORN & WESTIN*, *supra* note 5, at 205-06; *Lederman*, *supra* note 5, at 436-38.

284. 862 F.2d at 964.

285. *Id.* at 966.

286. *Id.* at 967. Perhaps Red Bull obtained a Pyrrhic victory. It was recently reported that Red Bull paid Best Western \$215,000 to settle the suit on the eve of trial (Best Western had counterclaimed). See Lisa W. Foderaro, *Motel Retracts Charge of Racism in Settlement of Best Western Suit*, N.Y. TIMES, Jan. 20, 1991, § 1, at 18.

287. 686 F. Supp. 447, 451 (S.D.N.Y.), *aff'd*, 862 F.2d 963 (2d Cir. 1988).

288. 686 F. Supp. at 452.

At any rate, *Red Bull* appears to be anomalous. Given the frequency of § 1404(a) motions,²⁸⁹ courts should give forum-selection clauses their appropriate weight in the post-*Stewart* world.²⁹⁰ Likewise, a second forum, considering a forum non conveniens motion, should consider such clauses as considerably reducing the significance of the “alternative forum” and “private interest” factors.

C. International Implications

As illustrated by *The Bremen*, choice-of-forum clauses may designate a jurisdiction outside the United States as the site of litigation. And, as *The Bremen* demonstrates, such clauses are often coupled with a choice-of-law clause selecting the law of the foreign forum. *The Bremen*²⁹¹ and later cases²⁹² nonetheless, in enthusiastically enforcing such clauses, pointed to the need to facilitate international trade and to depart from “provincial solicitude for the jurisdiction of domestic forums.”²⁹³

Such enthusiasm raises two problems, perhaps more starkly presented than in wholly domestic litigation. The first issue concerns the law applied in the alternative forum. If it differs from the American law that might otherwise apply, then litigating elsewhere could evade the regulatory purposes of such law. Second, and relatedly, the difficulties in litigating in another country may be so great that the opportunity to litigate constitutes no remedy at all. Nevertheless, while these concerns are not without force, they are not compelling enough for American courts to deny enforcement carte blanche to any clause designating a foreign forum.

The Bremen itself suggested that a choice-of-forum clause should not be enforced if it “would contravene a strong public policy of the forum in which suit is brought. . . .”²⁹⁴ Later cases hold that with respect to federal causes of action, the plaintiff must be able to vindicate her rights in the alternative forum,²⁹⁵ and federal statutes must be able to serve their remedial and deterrent functions.²⁹⁶ Despite this expansive language, it appears that the “public policy” exception is fairly narrow,

289. See Steinberg, *supra* note 274, at 446 n.11 (reporting over 3000 such motions in the federal courts in each of the fiscal years 1985 through 1989).

290. Judges, e.g., *Jones v. Weibrecht*, 901 F.2d 17, 19 (2d Cir. 1990) (per curiam) and commentators, e.g., Steinberg, *supra* note 274, at 521-23, have pointed out an anomaly caused by *Stewart*. If a party seeks dismissal, then choice-of-forum clauses are enforced with the vigor required by the *The Bremen/Carnival* line of cases. On the other hand, if transfer under § 1404(a) is sought, then *Stewart* reduces the clause to one factor among many, decreasing the chances of enforcement.

291. 407 U.S. at 9, 13-14.

292. E.g., *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629-31 (1985). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 cmt. h (1987) (general approval of forum-selection clauses).

293. *Mitsubishi*, 473 U.S. at 630.

294. 407 U.S. at 15.

295. *Mitsubishi*, 473 U.S. at 636-37 & n.19.

296. *Id.* at 637 (discussing federal antitrust laws).

requiring something more than mere difference in law,²⁹⁷ assuming that American law would apply in the first instance.²⁹⁸ While American regulatory interests can be undermined by contracting out of American law,²⁹⁹ a blanket rule forbidding such a result would virtually negate the use of choice-of-law clauses in the international context. In the absence of greater harmonization and uniformity of regulatory law at the international level, American courts can serve both party expectation and national interests by deferring to choice-of-law clauses unless the law chosen plainly provides no remedy.

The enforcement of a clause designating a foreign forum raises analogous issues. Here, the "seriously inconvenient" exception to *The Bremen* and *Carnival* comes into play. As suggested earlier,³⁰⁰ that exception will be difficult to make in the domestic context, given the relative ease of communication and travel between states, and the ability to retain local counsel in other states. The same factors may increase the inconvenience if the chosen forum is in another country. It is not surprising, then, that most of the cases in which courts have held the chosen forum is seriously inconvenient involve foreign tribunals.³⁰¹

Other cases, however, do enforce clauses that designate a foreign country as a forum.³⁰² In these cases the party seeking to defeat the clause is usually unable to demonstrate the inadequacy of the foreign forum.³⁰³ Recent cases that enforce such clauses seem, for the most part, to analyze the validity of the clause carefully, and to treat seriously

297. BORN & WESTIN, *supra* note 5, at 201.

298. In *The Bremen*, for example, the Court was dubious that the American law, apparently contrary to that of England, would in any event apply to the case. 407 U.S. at 15-16. See also *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991) (applying plain-statement rule to determine extraterritorial applicability of federal legislation).

299. Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 63-66, 72-73 (1991).

300. *Supra* Part II.C.

301. Perhaps the best known examples are cases arising after the Iranian hostage crisis in the late 1970's, where courts refused to enforce clauses designating Iran as the forum. *E.g.*, *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341 (8th Cir.), *cert. denied*, 474 U.S. 948 (1985). See generally BORN & WESTIN, *supra* note 5, at 199; Gruson, *supra* note 10, at 169 n.153.

For other examples, see *Weidner Communications, Inc. v. H.R.H. Prince Bandar al Faisal*, 859 F.2d 1302 (7th Cir. 1988) (refusing to enforce forum-selection clause designating Saudi Arabian courts); *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419 (1st Cir. 1991) (same with respect to Turkish courts); BORN & WESTIN, *supra* note 5, at 199-200. See also *id.* at 230-42 (addressing adequate alternative forum jurisprudence in the forum non conveniens doctrine).

302. For some recent examples, consider *Spradlin v. Lear Siegler Mgt. Serv. Co., Inc.*, 926 F.2d 865 (9th Cir. 1991) (Saudi Arabian courts); *Taag Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351 (9th Cir. 1990) (Swiss courts); *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 858 F.2d 905 (3d Cir. 1988) (Italian courts), *cert. dismissed*, 490 U.S. 1001 (1989); *Appell v. George Philip & Son, Ltd.*, 760 F. Supp. 167 (D. Nev. 1991) (English courts).

303. *E.g.*, *Spradlin*, 926 F.2d at 868-69; *Hodes*, 858 F.2d at 915. *Cf.* FED. R. CIV. P. 44.1 (placing burden on party who intends to raise issue concerning foreign law to give reasonable notice before doing so).

the claim that the foreign court is inconvenient.³⁰⁴ Put another way, these courts have not blindly enforced contractual norms at the expense of systemic regulatory concerns. Such a case-by-case approach can serve and enforce appropriate contractual expectations of the parties, while enabling reciprocity to develop at the international judicial level.³⁰⁵

In his dissent in *Carnival*, Justice Stevens asked whether the forum-selection clause would have been enforced, had it selected Panama rather than Florida as the forum.³⁰⁶ Had that been the case, it would have been incumbent on the Shutes to demonstrate that Panama was seriously inconvenient, and to describe the implications of applying Panamanian law, assuming the court there would apply that law. Given recent events in Panama, perhaps they could have discharged that burden. However Justice Stevens' question might be answered, the prospect of enforcing forum-selection clauses in these circumstances does not delegitimize the project of utilizing such clauses in international litigation.

IV. Privatizing Procedure

In the absence of forum-selection clauses, suits can only be brought in jurisdictions having minimum contacts with the defendant. Defendants who do not wish to be sued in that forum can contest jurisdiction by filing a motion with the court. The judge then rules on the matter, usually in the form of a written opinion, which, at some point, can be appealed.

This entire scheme is pretermitted by the use of an enforceable choice-of-forum clause. In effect, the parties contract to privatize a matter of procedure heretofore exclusively decided by the judiciary. *The Bremen* sanctioned this process for dealings between corporations. *Carnival* has now approved it for individual Americans dealing with large multinational companies. Undoubtedly, critics of *Carnival* will wonder if choice-of-forum clauses on the backs of tickets to Disneyworld or the

304. *E.g.*, *Taag*, 915 F.2d at 1353-54; *Hodes*, 858 F.2d at 912-16.

305. There is an extensive literature applying game theory to international relations. *E.g.*, COOPERATION UNDER ANARCHY (K. Oye ed. 1986); Robert D. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1 (1986); Emerson M. Niu & Peter C. Ordeshook, *Stability in Anarchic International Systems*, 84 AM. POL. SCI. REV. 1207 (1990); Joshua S. Goldstein & John R. Freeman, *U.S.-Soviet-Chinese Relations: Routine, Reciprocity, or Rational Expectations?*, 85 AM. POL. SCI. REV. 17 (1991).

With respect to jurisdictional issues, it is interesting to note that Great Britain and France, with which the United States has considerable trade, have moved toward a view of forum-selection clauses very similar to that of the United States in *The Bremen*. See ANDREAS F. LOWENFELD, CONFLICT OF LAWS 273-309 (1986) (English law); Cutler, *supra* note 4, at 113-22 (French law); *id.* at 122-29 (English law); Cindy Noles, Note, *Enforcement of Forum-Selection Agreements in Contracts Between Unequal Parties*, 11 GA. J. INT'L & COMP. L. 693, 703-05 (1981) (German law). *Cf.* Paul, *supra* note 299, at 49 (expressing doubts about effectiveness of reciprocity in this context); Weinberg, *supra* note 153, at 71-72 (same).

306. 111 S. Ct. at 1533 n.6 (Stevens, J., dissenting).

like will be enforced.³⁰⁷ They will also wonder if other procedural rights can similarly be commodified.³⁰⁸

Critics of the privatization of procedure can draw on a considerable literature developed by critics of ADR. In the forefront of the latter critique stand the adherents and teachers of metaprocedure.³⁰⁹ These writers contend that the analysis of civil litigation has for far too long elevated procedure over substance. According to these critics, traditional thinking about civil procedure usually ignores the context in which issues are decided. It often gives short shrift to the motivations, bargaining power, and goals of the parties and their counsel; to the way

307. Cf. *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 328-29 (1964) (Black, J., dissenting) (predicting that "[c]lauses like the one used against the Szukhents . . . will soon find their way into the 'boilerplate' of everything from an equipment lease to a conditional sales contract," and that it will give "a green light to every large company in this country to contrive contracts" requiring individuals to defend themselves "in some place, no matter how distant . . . or else suffer a default judgment.") Justice Black would probably say today that his predictions were confirmed in *Carnival*.

308. Other candidates for prospective waiver might be the constitutional or statutory right to a jury trial, cf. FED. R. CIV. P. 38 & 39 (permitting waiver of jury right under certain circumstances in pleadings or in other court proceedings), or various procedural due-process protections, compare *Fuentes v. Shevin*, 407 U.S. 67, 94-96 (1972) (finding conditional sales contract did not waive procedural due protections because it was not clear and was contained in a form contract) with *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) (opposite holding with respect to contract between two corporations).

309. The term "metaprocedure," which apparently originated at Yale Law School, refers to an approach to teaching civil procedure that looks beyond the Federal Rules of Civil Procedure to a wider focus on fairness, substantive results, and the like. See generally William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945 (1989) (book review).

Most likely, metaproceduralists would be considered devotees of the New Public Law. See William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991). The New Public Law is a descendant of the Legal Process paradigm of Hart and Sacks, which dominated much legal discourse in the 1950s and 1960s. That school emphasized rational proceduralism and deference to institutional competence, while also calling for appropriate change and reform in the law. *Id.* at 709-10. Legal Process came under attack from both the right (law and economics) and the left (Critical Legal Studies) in the 1970s and 1980s. *Id.* at 708. In response,

the New Public Law is unmistakably situated as a "center" between what is perceived as an overly objectivist and conservative law and economics and an overly confrontational and politicizing CLS. In our description, the New Public Law contains two roughly distinct subgroups that echo this external structure: New Public Law scholarship focusing on public choice theory and on the "fit" of social problem and regulator mechanism is a subdued version of the technocratic tendencies of the law-and-economics right; the emphasis on indeterminacy and the inevitability of choice in a distinctly progressive wing of New Public Law scholarship is likewise an echo of the left's emphasis on the politics of social construction.

Id. at 709.

While, as the name implies, the New Public Law is not directly concerned with private law as such, it would undoubtedly view with suspicion an effort to carve out areas of due-process protections under the aegis of contract law. See Daniel A. Farber & Phillip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 884-87 (1991).

a lawsuit is brought in the first place; and to the actual process of decision-making by the court, shorn of the exclusive focus on precedent.³¹⁰

Drawing on these concerns, these critics have questioned the infatuation of many lawyers and judges with ADR. They argue that justice, not mere efficiency, should be the goal of adjudication. Under this view, a settlement or a consent decree may be an inappropriate way to end litigation, especially where there are distributional inequalities between the parties, where non-parties will be significantly affected, or where there is a need for an authoritative exposition of law, through a written opinion by the judge.³¹¹

Similar criticisms could be lodged at consensual procedure. The valued features of procedure, giving autonomy to litigants and simultaneously empowering and placing constraints on judges,³¹² are apt to be discarded in a regime ruled by consent. Given inequalities in bargaining power, consent is likely to be illusory,³¹³ and privatization of procedure can devalue due-process protections and ultimately lead to their abandonment.³¹⁴

Although these arguments are not without force, they are not compelling when applied to forum-selection clauses. This conclusion follows for several reasons. First, the metaproceduralist critique carries less force in a purely private piece of litigation.³¹⁵ Whatever else might be said about forum-selection clauses, they generally arise in litigation like *Carnival*, with relatively little effect on third parties, as opposed to, say, a class action. In such cases, authoritative pronouncements of law are less important, and it seems difficult to believe that the stock of precedents on personal jurisdiction issues is going to erode to an inefficient level.³¹⁶

Second, a forum-selection clause is, perhaps, a form of ADR, since it resolves and renders unnecessary the judicial resolution of potential legal issues. Yet such clauses also differ rather dramatically from other

310. Eskridge, *supra* note 309, at 950-51. Perhaps the most prominent exemplar of these critics is the recent casebook by Owen Fiss, Judith Resnik, and the late Robert Cover. See COVER ET AL., *supra* note 118.

311. See, e.g., Harry Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676-79 (1986); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984); Eskridge, *supra* note 309, at 959.

312. Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 845-58 (1984).

313. COVER ET AL., *supra* note 118, at 1570-72; Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 545 (1986).

314. Mullenix, *supra* note 25, at 366-72.

Given her critique of forum-selection clauses in Mullenix, *supra* note 25, Professor Mullenix would have to be acknowledged as an adherent of the New Public Law as it relates to procedure. See also Linda S. Mullenix, *Burying (With Kindness) the Felicitic Calculus of Civil Procedure*, 40 VAND. L. REV. 541 (1987). But see Linda S. Mullenix, *God, Metaprocedure, and Metarealism at Yale*, 87 MICH. L. REV. 1139, 1165-70 (1989) (book review both praising and criticizing COVER ET AL., *supra* note 118).

315. Cf. Eskridge, *supra* note 309, at 959 ("Like his public values thesis generally, Fiss' anti-settlement thesis seems inapplicable to most lawsuits.") (footnote omitted).

316. Cf. Frank H. Easterbrook, *Justice and Contract*, 1987 U. CHI. LEGAL F. 19, 26-27 (analyzing Fiss's "too few precedents" thesis).

forms of ADR, since the parties to such a clause are not deprived of a court forum, as is the case in, for example, arbitration. The parties still have their day in court, albeit in a forum contractually agreed upon prior to the dispute actually arising.

Nonetheless, the metaproceduralist critique can inform the careful analysis of such clauses that *Carnival* and other cases require. For example, after *Carnival*, would the Shutes realistically have their day in a Florida court?³¹⁷ Perhaps the decision would have been more satisfying if we knew more about the context of the case. For example, why did the Shutes pursue litigation in Washington? Was it merely to obtain a presumably favorable jury or were there other factors at play? What were the actual costs, in time and money, of litigating across the continent? Could the extra costs be recouped, after trial or through a settlement? Would they have had to travel to Florida, except for the trial? Could the testimony of witnesses, particularly those who were in Washington, be presented by way of videotaped deposition? Would some of the depositions (for discovery purposes) be taken across the country in any event? Would the Shutes be required to leave their state to be deposed? This is some of the information that would inform a judgment of the "seriously inconvenient" prong of *The Bremen*, as it applied in *Carnival*.

On a macro level, we might ask similar questions. Is the use of form contracts, like the one in *Carnival*, likely to increase? Are consumers, like the Shutes, helpless to deal with the situation? Before one answers in the affirmative, we may want to know more about the particulars of the contractual arrangements. Is it clear that traditional contract law would *always* validate such clauses? To what extent might consumers (or their surrogates in federal or state agencies) have the power to get some legislative or executive response?³¹⁸ At first, we might answer "not much," but then we are reminded of the often extensive consumer-protection legislation passed at the federal and state levels,³¹⁹ and that certain form contracts, like *cognovit* notes,³²⁰ have been outlawed in virtually all states. Perhaps it is not irrational to predict that certain forum-selection clauses, if viewed as abusive, could be the subject of legislative regulation if the common law does not step in.

Finally, metaprocedure also reminds us of the value most Americans accord to procedural due-process protections. Empirical studies demonstrate that most people view contested, adversary adjudication as

317. Perhaps we should also ask if there are other avenues available for the Shutes to seek compensation—such as a suit against the travel agent. See, e.g., *Fling v. Hollywood Travel & Tours*, 765 F. Supp. 1302 (N.D. Ohio 1990), *aff'd mem.*, 933 F.2d 1008 (6th Cir. 1991).

318. Cf. Farber & Frickey, *supra* note 309, at 898-99 (public choice considerations can inform development of the common law).

319. See generally JOHN D. CALAMARI & JOSEPH M. PERILLO, *CONTRACTS* 429-34 (3d ed. 1987).

320. WEINTRAUB, *supra* note 87, at 109. Another form of regulation would be to require that standardized information be revealed in any forum-selection clause. See POSNER, *supra* note 111, at 348-50.

more fair and satisfying (whatever the outcome) than many forms of ADR.³²¹ Forum-selection clauses sit astride adjudication and ADR. They commodify procedure while simultaneously empowering potential litigants to resolve an issue ahead of time. The merits of the dispute are still resolved in the usual adversarial process. The uneasy confluence of values both served and undermined by such clauses suggests that some middle path between invalidation and total deference to such clauses is called for. This Article concludes that current doctrine, even as exemplified by *Carnival*, proceeds down that route.

Conclusion

The post-*Carnival* era seems an apt time to revisit the workings of forum-selection clauses. On the one hand, a case like *The Bremen* is virtually the best-case scenario for the enforcement of such a clause. It concerned two corporations of apparently equal bargaining power, which dickered over the clause in their contractual negotiations. It is difficult to argue that the selection of a neutral, English forum to resolve a dispute between multinational enterprises is fundamentally unfair. In contrast, *Carnival* seems the worst case with which to defend a choice-of-forum clause. In that case, the clause was in the proverbial fine print of a non-negotiated form contract between ordinary consumers and a large company. The clause required the consumers to litigate, if at all, across the continent from their homes.

Despite these rather dramatic differences, this Article argues that the results in both cases are correct. The rights waived by such clauses are not immutable, and whether or not federal or state law is determined to govern, ordinary principles of contract law are largely proper to police such bargains. Exogenous values are served by the requirement that the court depriving itself of the case determine that the chosen forum is not seriously inconvenient to the parties, and by the option retained by the receiving court to transfer or dismiss the case (if it determines that it can be litigated more conveniently elsewhere). A healthy but not blind deference to forum-selection clauses can serve the values of enhancing the parties' contractual expectations, reducing litigation over jurisdictional issues, and of respecting procedural due-process protections.

321. See E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990); Tom R. Tyler, *What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988).

